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ERRATA.

Page 37, line 30. For "depend" read "defend."

" 81. For "continued from page 80," read "continued from page 9."

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THE AMERICAN LAW REGISTER.

JANUARY 1882.

MARITIME LIENS.

MOTIVES of public policy and commercial convenience have, on both sides of the Atlantic, led to a wide extension of the jurisdiction of courts of admiralty.

The peculiar advantages possessed by the maritime lien, the facility with which, by its instrumentality, employment is secured for vessels, their repairs made or supplies furnished in localities wherein the owners are unknown, absent, or if present, without credit, the great safeguard it affords to all who deal with ships or ships' credit, providing them with a prompt and simple remedy in their own forum, and with something tangible against which to issue execution in the event of success, have been the means by which this result has been brought about.

To call a privilege applicable to cases sounding both in contract and *tort* a lien, must, to the majority of the profession, appear a misnomer.

It is indeed in name rather than in principle that any analogy to either the common-law or equitable lien will be found to exist. Unlike the former, it exists irrespective of possession, actual or constructive; unlike the latter, its origin is independent of the creation of a trust; unlike both, it arises and takes effect by virtue of the act done, whether it be the breach of a maritime contract or the commission of a maritime *tort*.

The ship is the most living of inanimate things. "She did it, and she ought to pay for it," is a familiar manner of expressing the liability incurred by the vessel held to be in fault in a case of collision: Holmes on Common Law 25-35.

The maritime law gives full recognition to this investiture of the ship with personality—it is *she* that may make a contract or commit a *tort*, and it is against *her* that the lien is implied. When procedure is commenced, the suit is brought not against a personal defendant, but against *her* by name; and, if the libellant succeeds, *she* is sold to discharge an indebtedness of *her* own creation.

In both the common law and the admiralty, the original method of enforcing legal liability was to arrest the wrongdoer. The method of procedure was confined to the action against him. The law knew no third person in the transaction, unless such third person subsequently interfered for the purpose of buying this vengeance off. In a numerous class of cases the person most likely to interfere was the master or owner of the offender; and, with the lapse of time, a new principle was recognised, viz., that of the responsibility of the master or owner by reason of the acts of the original wrongdoer.

It is at this point that the history of the common law and that of the admiralty diverge, each choosing that path which would best attain the common end. In the former system, the arrest of the original wrongdoer was, in a numerous class of cases, no longer resorted to; legal responsibility was more readily and more satisfactorily secured by proceeding immediately against the principal. In the latter system, the history of the question has been reversed. Principals were hard to get at; they often lived at points remote from the scene of contest, or, if present, there were circumstances and conditions under which they would not be liable by reason of the ship's being temporarily in charge of a third person, for whose acts or defaults they would not be liable. The maritime law therefore continued to cling to the arrest of the original wrongdoer; and, in so doing, they availed themselves of the popular fiction, regarding the ship as an animate object, and as responsible for her own acts. The necessary sequence of regarding the ship as an animate object and as being responsible in specie for her own acts, was that she may be bound, that she may be proceeded against *corporaliter*, and that as against her a liability may exist in cases wherein the law of agency would not bind her owners.¹

¹ The lien has been enforced in a collision case against the vessel in fault, although she was at the time under the entire control of her charterers: *The Ticonderoga*,

The lien is a debt or privilege to be paid out of the *res ipsa*, the ship or its incidents, the cargo and freight, or any or all of them, the condition of the privilege being that the debt should have arisen out of such a transaction as is cognisable in the admiralty: Coote's Ad. Pr. 17.

Causes cognisable in the admiralty embrace both maritime contracts and maritime *torts*. The test of jurisdiction is in each class distinct. In the former it is determined by the subject-matter; in the latter, by locality.

Without enumerating in detail the various contracts which have been adjudged to be maritime, it is necessary to remember that the principle upon which the decisions rest is that the test is to be applied to the *subject*, not to the *object*—that is to say, it is the *subject-matter* of the contract which must be maritime, not the mere object—the ship: *Leland v. The Medora*, 2 Wood. & M. 109. Thus, neither a contract to build a ship (*Ferry Co. v. Beers*, 20 How. 393), nor the creation of a mortgage on her after she has become a ship (*Bogart v. The John Jay*, 17 How. 359; *Deely v. The Earnest and Alice*, 2 Hughes 77),¹ nor the storage of her sails between her voyages,² are such contracts as are cognisable in the admiralty. But if the subject-matter or service be in its nature maritime,³ it matters not whether the object be propelled

Swaby 215, 217. And the same rule has been applied when the vessel was in charge of a pilot whose employment was made compulsory by the law of the port: *The China*, 7 Wall. 58. Even though a charter-party amount to a demise of the ship, contracts of affreightment entered into with the master in good faith within the scope of his apparent authority bind the vessel: *The Freeman v. Buckingham*, 18 How. 192; *The City of New York*, 3 Blatch. C. C. R. 187; *The Canton*, 1 Sprague 437; *The Monsoon*, Id. 37. Sailors have a lien for their wages, though their contracts be made with the charterer: *Hart v. The Enterprise*, 3 Weekly Notes of Cases 172.

¹ But if the mortgage be given for necessities, the material-man may recover on his implied lien, though his express one fail: *The Hilarity*, Blatch. & How. 90.

In England, since the passage of the Judicature Acts of 1873 and 1875, the admiralty have jurisdiction over all questions relating to the mortgage of ships: they are not, however, maritime liens: Boyd's Merchant Shipping Laws 66-75.

² This service is wholly shore service, is performed on land, and is not connected with the navigation or employment of a vessel: *Hubbard v. Rouch*, 2 Fed. Rep. 393.

³ The breach of a contract to carry cargo is maritime in character, even though the vessel used is a canal boat, engaged in voyage between two ports in the same state: *The E. M. McChesney*, 8 Benedict 150. The services of a stevedore must be regarded as doubtful: *The Geo. T. Kemp*, 2 Lowell 477. The watchman has no lien: *The John T. Moore*, 3 Wood 68. Contracts made for the removal of ballast in port are maritime: *Roberts v. Bark Windermere*, 2 Fed. Rep. 722. A contract to cooper casks

by sails or steam, by motive power from within or without, whether she have anchors or chains; nor is it in any way dependent upon the size, form or capacity of the vessel: *The General Cass*, 1 Brown's Ad. Rep. 334; *The Daniel Ball*, 10 Wall. 557.

In tort, as in contract, the jurisdiction of the admiralty has been widely extended. Obsolete and inapplicable tests have been gradually swept away.

The presence or absence of tide is immaterial. It matters not whether the waters whereon the wrong has been committed be artificial or real, or whether or not they lie wholly within a single state, or whether or not they form a boundary line between contiguous states. If the injury be complete on public navigable waters of the United States the jurisdiction will be sustained (*The Genesee Chief*, 12 How. 443; *Fretz v. Bull*, Id. 466; *The Magnolia*, 20 Id. 298; *The Commerce*, 1 Black 574; *The Eagle*, 8 Wall. 15);¹ and the rule is that whenever one vessel does damage to another, within the admiralty and maritime jurisdiction, the offending vessel² becomes hypothecated to the vessel and

for delivery, according to a contract of affreightment, is maritime: *The Onore*, 6 Benedict 564. The weighing, inspecting and measuring of cargo is a maritime service: *Constantine v. Schooner River Queen*, 2 Fed. Rep. 731. Supplies furnished to a floating elevator, to the restaurant of a boat plying between New York and Long Branch, and liquor intended for use at the bar, are maritime contracts: *The Hezekiah Baldwin*, 8 Benedict 556; *The Long Branch*, 9 Id. 89; *The Plymouth Rock*, 13 Blatch. 505.

¹ A collision on public navigable waters has been held to embrace canals. See *The Avon*, 1 Brown's Ad. Rep. 170; *The Steamboat Oler*, 14 Am. Law Reg. (N. S.) 306; *The Young America*, Newberry's Rep. 101; *Malony v. City of Milwaukee*, 1 Fed. Rep. 611. Those waters are navigable in law which are navigable in fact: *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Id. 430. When the collision occurs between two objects, one of which is terrene and the other afloat, the wrong may or may not be a maritime tort. It is the locality of the thing injured, and not that of the object by which the injury was done, that determines the jurisdiction: Etting on Admiralty Jurisdiction, pp. 64, 65, 66, 67. The admiralty jurisdiction has been sustained in a case of collision between a vessel and a floating dock, the latter being moored to the shore: *Simpson v. Tug Ceres*, Leg. Int. (1879) 339. And see, also, *The Virginia Ehrman and Agnese*, 7 Otto 309.

² The lien does not, in such a case, extend to the cargo on board, but it includes the freight: *The Victor*, Lush. 72; *The Duchesse de Brabant*, Sum. 264; *The Leo*, Lush. 444. A vessel may be termed an "offending vessel," so as to confer a lien upon her by causing damage to another, even though no actual collision takes place: *The Industrie*, Law Rep., 3 Adm. & Eccl. 303. And if one ship, by the improper navigation of a second ship, is compelled to alter her course, and so does damage to a third ship, the lien is held to run against the ship which compelled the alteration of the course; and this liability attaches if the damaged ship was not actually

cargo sustaining the injury, and the injured persons have a lien or privilege upon the guilty property to the extent of the injury sustained: *Edwards v. The Stockton*, Crabbé 580; *The Rock Island Bridge*, 6 Wall. 213.

Every dispossession of property afloat on public navigable waters is *prima facie* a maritime tort, and the vessel is liable for all acts by the master done in the execution of the business in which she is employed by which third persons are injured, whether the injury be occasioned by an unlawful act, negligence or want of skill: *Dias v. The Revenge*, 3 Wash. C. C. 262; *Dean v. Angus*, Bee 369; *The Martha Anne*, Olcott 18; *Ralston v. The States' Rights*, Crabbé 22.¹

A contract may be maritime and yet personal—or, in other words, the circumstances may repel the presumption of lien; or the cause may be maritime, and yet the policy of the law may refuse a lien.²

The jurisdiction is significant, not because a lien exists for the breach of every contract which has been held to be maritime, but because it points out certain definite limits, to the borders of which the lien may extend, but beyond which it cannot go.

Maritime liens are divisible into two classes:

- (1.) Those which are created by the terms of the contract.
- (2.) Those which arise by implication of law.

negligent, even though by taking another course she might have avoided the collision: *The Sisters*, 1 Prob. & Div. (C. A.) 117. And the lien will extend to cases of personal injury suffered by a passenger or employee: *Gerrity v. The Bark Kate Cann*, 2 Fed. Rep. 241; *The Bark Tulchen*, Id. 600; *The Maverick*, 1 Sprague's Dec. 23. And if the injuries be caused by a vessel other than that on which he is embarked, the lien will run against the vessel adjudged to be in fault; or, if both be in fault, against both. And the entire sum awarded may be collected from either, in the event of the inability of both to pay it. But the primary liability would seem to be against the vessel with which the contract was made: *The Washington Gregory*, 9 Wal. 513; *The Steamer Philadelphia*, 1 Black 62.

¹ It is not necessary, in order to enable the libellant to recover, that he should show wilful misconduct or wrongful purpose on the part of the tortfeasor. He may recover whether the claimant obtained possession by contract, or by conversion to his own use without any wrongful intent: *The Florence*, 23 Int. Rev. Record 105.

² The hiring of a master is quite as much a maritime contract as is that of hiring the crew. The latter have a lien for their wages, the former has not. This exception in the maritime law of the United States is said to have had its origin in the circumstance that it was contrary to the policy of the law to vest this power in the master, who might be thus in a position to avail himself of it as against his owners without proper cause: *The Ship Grand Turk*, 1 Paine 73.

As between themselves, *prima facie* parties may, by contract, agree upon what they please; they may agree to give a lien where none exists, or to renounce one where it does exist. It is only when the contract is illegal, or when the rights of third parties are contravened that the law interferes. The limits of this article preclude any consideration of liens thus created.

With regard to implied liens, the rule is that, by the general maritime law, liens are implied for the performance of all executed maritime contracts lawfully entered into: *The Williams*, 1 Brown 214.

The general maritime law is only so far the law of any country as it has been adopted by that country. Whilst, therefore, the general maritime law is the basis of the maritime law of the United States, certain qualifications and exceptions nevertheless exist which sensibly influence our maritime code.

The points of difference which exist in the maritime law of each nation are for the most part to be found on the border line, where the local or municipal law comes in conflict with the general maritime law.

In the United States this difficulty has been increased by the complex character of our government, where separate and distinct powers of sovereignty are exercised by the United States and a state independently of each other within the same territorial limits.

In order to draw the line of demarcation between the two classes of cases, it is proposed to consider separately (1) the liens implied by the maritime law of the United States; (2) the liens arising by force of the municipal law, but enforceable in the admiralty. The former class might with propriety be termed pure maritime liens, whilst the latter are but quasi maritime. Pure maritime liens arise and take effect by virtue of the act done or wrong committed without any express words stipulating therefor, or, in other words, the law implies a lien as a sequence to the responsibility attachable to the ship as a living thing, having the ability to make contracts or commit torts.

Of course, it is a good defence to a lien which is asserted, to aver and prove that the credit was personal, that it was given to the owner or master, and not to the ship.

The question of credit is one purely of fact, the presumption of law being in favor of the doctrine that the credit of the ship was implied, that it was an element of the original contract; the char-

terer of a vessel, the shipper of goods, the seamen who are hired for the voyage, all presumptively deal with the ship as a living thing, and contract with her on a credit of her own; and if it be asserted that the credit was personal, the presumption may be rebutted, but the law casts the burden of proof upon him who denies the existence of the lien. The lien is not dependent upon the doctrine of agency, the master can impress liens on his vessel by acts or neglects for which his principal would not be bound, as for example when he is appointed by a special owner or even in cases where he is not lawfully master at all; and so conversely there may be cases in which the *vessel* may be proceeded against, as for salvage services or for a bottomry bond negotiated on her credit, or for repairs caused by a collision, though her owners could not be sued therefor: *Oakes v. Richardson*, 2 Lowell 173; *Freeman v. Buckingham*, 18 How. 182; *The City of New York*, 3 Blatch. C. C. R. 187. The question of credit is especially significant when the advantages of the maritime lien are invoked in suits growing out of contracts with material men.

Contracts of this character will be subsequently considered; it is sufficient for our present purpose to say, that they differ essentially from maritime contracts in general, that they are not strictly maritime, and that the lien differs both in its origin, reason and application from that given by the general maritime law. In the cases of contracts previously referred to, it has been assumed that they were not only maritime but also executed. Suppose, however, they are maritime but executory.¹ The maritime law appears to draw a distinction between a misfeasance and non-feasance, in cases of this character. To illustrate, if there be concluded between A. and B. a charter-party by which it is agreed that A.'s vessel shall sail from Philadelphia for Boston, and she never clears for the latter port, B.'s remedy will be confined to a personal suit

¹ If they are executory in the sense of being incomplete, as in preliminary contracts leading to the execution of maritime contracts, they are without the jurisdiction of the admiralty. In the *Schooner Clytie*, 8 Weekly Notes of Cases 188, it was held that the admiralty had no jurisdiction *in personam* for the breach of a contract made by the master of the vessel to purchase cargo, and that the insertion thereof in the charter-party did not make it a maritime contract.

If, however, the contract as a whole be maritime, the mere circumstance that certain stipulations contained therein are not strictly maritime will not prevent the court's entertaining jurisdiction. In such a case the contract is not regarded as being severable: *The Pacific*, 1 Blatch. C. C. R. 470.

- against A. But if, on the other hand, she does clear from Philadelphia, and instead of proceeding to Boston as stipulated for in the contract, goes elsewhere, B. may then elect either to sue A. personally or to proceed against the vessel. In either event the injured party may sue in the admiralty, because the subject-matter of the contract is maritime. But in order to entitle a suitor to sue *in rem*, it is not enough that the contract should be maritime, the breach must also be maritime, or there must, in other words, be both a maritime contract and a maritime cause of action: *The William Fletcher*, 8 Benedict 537; *The General Sheridan*, 2 Id. 294; *Scott v. Chaffee*, 2 Fed. Rep. 401. See, however, *contra*, *The Williams*, 1 Brown's 208; *The Pacific*, 1 Blatch. 507.
- This is, it is believed, the philosophical explanation of the principle upon which this distinction is based. The most obvious application of the doctrine is found in a line of cases wherein a lien has been claimed for the breach of a contract of affreightment.

It is an elementary principle of the maritime law that there exists a reciprocal obligation between the ship and cargo, that each is pledged to the other for the faithful performance of the contract. But it is manifest that so long as the contract remains executory, or, in other words, until delivery has taken place, there can be no duty to carry, and *ergo* no lien arises.¹ Actual contact of ship and cargo is not necessary; the rule would seem to be that whenever such a delivery has been made to the carrier as would impose upon him the extraordinary liabilities attaching to his character, there is created a lien upon the ship to secure the performance of the contract.²

¹ But when delivery has been made, the contract is no longer executory, and the duty to carry at once arises, and if the contract is rescinded by the shipper, the carrier may proceed to collect his damages against the cargo, even though he has never started on his voyage: *The Hermitage*, 4 Blatch. C. C. R. 474.

² In *The Edwin*, 1 Sprague 478, affirmed in 24 How. 386, the lien was sustained for cargo lost on a lighter whilst on its way to the vessel, the court holding that if the delivery be made to the master the lien existed, irrespective of the circumstance that actual contact had not taken place. A contrary doctrine was expressed in *Freeman v. Buckingham*, 18 How. 182, and also in *Vanderwater v. Mills*, 19 Id. 82. Neither case, however, was decided on that ground. The real issue in the former case being whether the ship was liable for the fraudulent signing of a receipt by the master for goods which he never received. In the latter case the contract was held to be one of partnership and not of affreightment, and therefore not within the jurisdiction of the court.

The liability of the owners and the liability of the ship commence at the same moment, and it will attach on delivery of the goods to the owner's servants alongside of the vessel: *British Columbia Saw Mill Co. v. Nettleship*, L. R., 3 C. P. 499; *The Edwin*, *supra*; 2 Pars. on Ad. and Ship. 252; Angell on Carriers 129, 148. Although of course neither owner nor ship will be liable if the delivery be made without any previous contract to a servant who has no authority, either apparent or real, to receive them: *Trowbridge v. Chapin*, 23 Conn. 595; *The Keokuk*, 9 Wall. 517.

THEODORE M. ETTING.

Philadelphia.

(To be Continued.)

RECENT AMERICAN DECISIONS.

Court of Appeals of New York.

VAN VOORHIS v. BRINTNALL ET AL.

The general rule that a contract, valid by the law of the place where it is made, is valid everywhere, includes the contract of marriage.

To this rule, as regards marriage, there are exceptions, first, of incest or polygamy coming within the prohibitions of natural law; and second, of prohibition by positive law.

While laws may have an extra-territorial effect, so far as to affect a citizen subject to them for acts done outside the state, yet such effect is exceptional, and a statute imposing a personal disqualification will not be construed to extend to acts done beyond the state, unless it contains express words to that effect.

The provision of the statute prohibiting a respondent divorced for adultery from marrying again is a penalty and has no extra-territorial effect.

A man divorced by the courts of New York for adultery, and therefore prohibited from marrying again, went to Connecticut with the intent to evade that prohibition, married and immediately returned to New York. *Held*, that the marriage was valid.

THIS was an action to determine the rights of the parties under the will of Elias Van Voorhis.

Barker Van Voorhis, a son of testator, was divorced from his wife in 1872, by a decree of the Supreme Court of New York, by which he was prohibited from marrying again. In 1874, being

still domiciled in New York, he and Ida Shraeder, also a citizen of New York, went to Connecticut and were duly married under the laws of that state. On the same day the couple returned to New York and remained domiciled there till the death of Barker in 1880. It was found as a fact by the court below, that they had gone to Connecticut for the purpose of evading the New York law. The plaintiff in error, Rose Van Voorhis, was the child of this marriage, and the question was whether she was a legitimate child of Barker, and therefore entitled to share under the will of her grandfather, the testator.

D. M. Porter, for appellant.

C. W. Stevens and *R. Busteed, Jr.*, *contra*.

The opinion of the court was delivered by

DANFORTH, J. [After stating the facts.] The question involves the civil status acquired by Barker Van Voorhis and Ida by the marriage in Connecticut. First. It is a general rule of law, that a contract entered into in another state or country, if valid according to the law of that place, is valid everywhere (*The King of Spain v. Machado*, 4 Russ. 225; *Potter v. Brown*, 5 East 130; Story Conflict of Laws, sect. 242); and this, says KENT, 2 Com. 454, is *jure gentium*, and by tacit assent; and Lord BROUGHAM, in *Warrender v. Warrender*, 2 Cl. & Fin. 529, 530, declares that the courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate* but *ex debito justitiæ*; and, according to the case in hand, the rule recognises as valid a marriage considered valid in the place where celebrated: Story Conflict of Laws, sects. 69, 79; *Connelly v. Connelly*, 14 Jur. 437. "We all know," says the court in that case, "that in questions of marriage contract, the *lex loci contractus* is that which is to determine the status of the parties," and also declares that this, by consent of all nations, is *jus gentium*. In *Dalrymple v. Dalrymple*, 2 Hagg. 54, it was held that a marriage good in Scotland, though otherwise by the laws of England, is valid in that country; and this was put upon the ground that the rights of the parties must be tried by reference to the law of the country where they originated. In *Scrimshire v. Scrimshire*, 2 Hagg. 395, the same principle is stated in different words. The

court says: "All parties contracting gain a forum in the place where the contract is entered into:" *Warrender v. Warrender*, *supra*; *Lacon v. Higgins*, Don. & R. N. P. C. 38; *Butler v. Freeman*, Amb. 303. Not only is this the result of English decisions, but is believed to state the principle upon which the courts of many of our sister states have acted: *Greenwood v. Curtis*, 6 Mass. 358; *Medway v. Needham*, 16 Id. 157; *Parton v. Hervey*, 1 Gray 119; *Putnam v. Putnam*, 8 Pick. 433; *Dickson v. Dickson*, 1 Yerg. 110; *Stevenson v. Gray*, 17 B. Mon. 193; *Fornhill v. Murray*, 1 Bland Ch. 479, and by which our own with few exceptions, have been governed. In *Decouche v. Savetier*, 3 Johns. Ch. 210, Chancellor KENT says: "There is no doubt of the general principle that the rights dependent upon nuptial contracts are to be determined by the *lex loci*." In *Cropsey v. Ogden*, 11 N. Y. 228, JOHNSON, J. says: "By the universal practice of civilized nations, the permission or prohibition of particular marriages of right belongs to the country where the marriage is to be celebrated." The court had before it the case of one who, having a former wife living, from whom he then had been divorced for adultery by him committed, married a second time in this state. His last marriage was held to be void under our statute prohibiting a second or other subsequent marriage by any person during the lifetime of any former husband or wife of such person. Here the former marriage, his adultery and the existence of his first wife, established the condition or quality of the man. They were facts in his history, and brought him within the terms of our law. The general rule above stated was applied. The *lex loci* governed. But the court said it was not necessary for them to consider what would have been the effect of a marriage celebrated out of this state. Its attention was, however, directly brought to the statute relating to marriages, and the circumstances under which the remarks above quoted, and others seeming to discriminate between a marriage in this state and out of it, were made, render them the more significant. In *Haviland v. Halstead*, 34 N. Y. 643, a person divorced for the same offence in this state, promised in New Jersey to marry the plaintiff. He married another, and an action for the breach of this promise was brought here, and failed. The parties resided in this state and contemplated the performance of the contract here. The court carefully distinguish the case so presented from one where a marriage had taken place in a foreign state. They

assume that the latter would be treated as valid, although the parties had gone there with intent to evade the laws of this state, and citing *Medway v. Needham*, *supra*, say the doctrine "in favor of marriage so contracted is founded on principles of policy, to prevent the great inconvenience and cruelty of bastardizing the issue of such marriages, and to avoid the public mischief which would result from the loose state in which people so situated would live." Indeed, the general doctrine is so well settled by the decisions of all courts and the reiteration of text-writers, as to become a maxim in the law, that one rule in these cases should be followed by all countries; that is, the law of the country where the contract is made: Story, *supra*, 84; 2 Kent Com. 91, 92. There are, no doubt, exceptions to this rule. Cases, first, of incest or polygamy coming within the prohibitions of natural law: *Wightman v. Wightman*, 4 Johns. Ch. 343; *Hutchins v. Kimmell*, 31 Mich. 133; Story, *supra*, sect. 113, 7th ed; second, of prohibition by positive law. It is contended by learned counsel for the respondent, that the judgment may be upheld upon the ground that the marriage is one of the latter class. The assertion, however, is left unsupported by argument or the citation of authorities. Its truth is not so self-evident as to dispense with either, and the omission, coupled with our own examination, leaves us to think that the courts have not yet spoken with a controlling voice in its favor. It is to be maintained, if at all, upon the prohibition in the judgment of divorce already referred to, and the provisions of the statute which made the judgment proper: *Graves v. Graves*, 2 Paige 62. The question is not one of ethics or morality but the extent of the authority of the statute as a rule of conduct. As a direct inquiry, it is here for the first time. There are *dicta* and expressions having relation to it in *Cropsey v. Ogden*, and *Haviland v. Halstead*, *supra*, tending to confine the effect of the statutory prohibition and declaration of invalidity to second marriages within this state; but in neither case was the precise question before the court for judgment. In other courts of this state it has met with differing answers. In the Supreme Court, First Department (*Marshall v. Marshall*, 2 Hun. 238, by a divided court, and *Thorpe v. Thorpe*, Superior Court of the City of New York, following it), a marriage under similar circumstances was held void. The judgment now before us went upon the principle of *stare decisis*, the court below also following *Marshall v. Marshall*,

supra. *Kerrison v. Kerrison*, Special Term, Fourth Department, 8 Abb. N. C. 444, and *Matter of Webb*, 1 Tucker 372 (Sur. Ct.), are to the contrary. To the latter class may be added *Ponsford v. Johnson*, before NELSON and BETTS, JJ., 2 Blatch. 51. These decisions are irreconcilable, and any determination reached by us must overrule one class or the other. We are therefore at liberty to treat the subject as *res integra*, unaffected by any paramount authority, although greatly assisted by the reasoning of the learned judges who have taken part in those judgments.

The statutory provisions relied upon by the respondent are found in part 2, ch. 8 of the Revised Statutes, entitled "Of the domestic relations," and especially in those articles which treat "of husband and wife," tit. 1, arts. 1-5, vol. 3, p. 148. The statute does not define marriage, or introduce a new formula for the relation, but treats it as existing, and declares it shall continue "in this state" a civil contract. Sec. 1, ch. 8, tit. 1, art. 1, part 2, adopts the principles of the common law, which renders invalid marriages between persons connected by certain lines of consanguinity (sec. 8, *Id.*), or who, for want of age or understanding, are incapable of consent, or who, if capable, have been induced to give it by fraud or force: Sec. 4, *Id.* It then declares that no second marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, unless the marriage with such "former husband or wife shall have been dissolved for some cause other than the adultery of such person; and that every marriage contracted contrary to this provision shall be absolutely void:" Sec. 5, *Id.* These circumstances are re-stated as grounds of divorce, and it is enacted that "whenever a marriage shall be dissolved pursuant to the provisions of this article, the complainant may marry again during the lifetime of the defendant; but no defendant convicted of adultery shall marry again until the death of the complainant:" Sec. 49, *Id.*, art. 3. As originally enacted, the same statute (tit. 1, *supra*, sec. 2) not only made the consent of parties essential, but limited the class to those "capable in law of contracting," and by its definition excluded males under seventeen and females under fourteen years of age. Although this provision has been repealed, it throws some light upon the legislative intent in devising the system of laws concerning husband and wife. Conditions were annexed, not only to the duration, but the creation of this relation, and the frequency.

with which it might be formed. Certain persons were declared capable, others incapable of forming it, and still others must submit to its dissolution. In one instance, as in the case before us, it cannot be contracted with another while the first co-contractor is living. It is obvious that this last condition is in the nature of a penalty: *Wait v. Wait*, 4 N. Y. 101; *Comm. v. Lane*, 113 Mass. 471. It forms no part of the relief sought by the injured party, has no tendency toward compensation, nor is it imposed to that end. It is restraint or punishment: *West Cambridge v. Lexington*, 1 Pick. 506-508; *Clark v. Clark*, 8 Cush. 386. The fact of adultery is, in the language of the statute, an "offence," the person committing it a "guilty person," and when established by judgment he is said to be "convicted;" he is, in consequence of it, deprived of a natural right or privilege which others enjoy. Moreover, for violating this statutory provision, he is at least rendered liable to fine and imprisonment as for a misdemeanor (2 R. S., part 4, ch. 1, tit. 6, p. 696, secs. 39, 40), if not for felony, under the provisions of article 2 of the same statute: 2 R. S., p. 687, vol. 2. The opinion of WALWORTH, Chancellor, went to that extent in *Graves v. Graves*, 2 Paige 62; and, although *People v. Hovey*, 5 Barb. 121, is to the contrary, the measure of the offence is not now important, and the last case holds to the misdemeanor. To that extent the law is plain. The real question is whether such a statute furnishes an exception to the maxim "*Leges extra territorium non obligant*." It is not necessary to assert that the power of the legislature is so limited that no law passed by it would accompany a citizen into other countries, and there control or modify the legal effect of his actions. Nor need we deny that it might be so framed as to affect his person, and subject him in this state to punishment for its violation elsewhere, upon his return to the jurisdiction of our courts. On the contrary it is to be regarded as settled law that as all persons within its borders, whether citizens or aliens, are liable to be punished for any offence committed in this state against its laws, its citizens may also be punished for acts committed beyond its borders, where there is a special provision of law declaring the act to be an offence, although committed out of the state: Maxwell on Statutes 119, 128: *Cope v. Doherty*, 2 De G. & J. 624; 1 Burge Col. & For. Laws 196. So, also, may an act committed out of the state be made to affect an individual, whether citizen or foreigner, when he comes within

its borders and does some other act of which our laws take notice. Nor are examples of legislation effecting these results wanting. The statute defining acts which constitute treason (tit. 1, part 4, ch. 1, p. 928; 3 R. S., sec. 2) illustrates the first. It subjects the offender to punishment, whether the act prohibited is done "in this state or elsewhere." That against duelling is an example of the second. It makes one who, by previous engagement, fights a duel without the jurisdiction of this state, and in so doing inflicts a wound upon any person, "whereof he shall die within this state," and every second engaged in such duel, guilty of murder within this state. And still more in point, as illustrating its manner of expression, where the legislature intends to take cognisance of an act committed outside the limits of the state, or to impress upon the *status* of its citizens a condition of liability for such an act, are the revisions of the statute treating of offences against "the public peace and public morals:" tit. 5, part 4, ch. 1, act. 1, vol. 2. R. S. After providing punishments for fighting duels, sending challenges, &c., in the most general terms, excluding no one from its condemnation, but within the general maxim above quoted, having no extra-territorial force, comes a provision which, by its special language, attaches to the citizen, goes with him as he crosses the line of this state, and binds him with an obligation in what place soever he is. "If," it says (sec. 5, Id.), "any inhabitant of this state shall leave the same for the purpose of eluding the operation" of these provisions, and "shall give or receive any such challenge" * * * without this state, he shall be deemed guilty and subject to the like punishment as if the offence had been committed within this state. And we shall see later a provision similar to this, now forming part of the law relating to marriages in the state of Massachusetts. Another instance well shows by contrast the necessity of a declaration that the arm of the law shall be so extended. In proximity to the provisions I have quoted, in the next article (sect. 8), is the statute "of unlawful marriages," defining bigamy and declaring its punishment, saying, in general terms, "every person having a husband or wife living who shall marry any other person" (with exceptions of no moment here), shall be adjudged guilty of bigamy, providing (sect. 10) that an indictment may be found against any person for a second, third or other marriage herein prohibited, in the county in which he shall be apprehended, and the same proceedings had

thereon, "as if the offence had been committed therein." Yet there are no enlarging words affixing themselves to the person of the citizen, as in the statute before quoted, or bringing within its purview "a second or other marriage," contracted out of the state; and therefore, on the trial of one who was indicted for bigamy, the second marriage having taken place in Canada, it was held as early as 1855, by a court presided over by the late Judge W. F. ALLEN, then a justice of the Supreme Court, that this statute had no application; that the second marriage was not an offence against the laws of this state, because they have no "extra-territorial force." In like manner, if Barker Van Voorhis had, on his return to this state, after accomplishing his second marriage, been indicted under the statutes to which I have referred, either for bigamy or for doing a prohibited act, it would necessarily follow that the indictment would fail. Yet the words of the statute are general; in themselves they contain no limitation. But we have been referred to no case, and I think none can be found, where such general words have been interpreted so as to extend the action of a statute beyond the territorial authority of the legislature, and it is only by extending it that our courts can take cognisance of acts there committed.

Of the third class, an example is afforded by our statute defining punishment for a second offence. Sect. 8, p. 699, vol. 2, Rev. Stat., part 4, ch. 1, tit. 6. "If any person," it says, "convicted of any offence punishable by imprisonment, &c., shall afterwards be convicted of any offence, he shall be punished" in a mode prescribed. It is evident that these words are general, and taken literally would apply to "any person" committing an offence in or out of the state. Applying the mode of construction contended for by the respondent, nothing more could be necessary. But the legislature show that such is not its meaning. By sect. 10 they declare that "every person who shall have been convicted in any of the United States, or in any district or territory thereof, or in any foreign country, of an offence which if committed in this state would," &c., "shall upon conviction of any subsequent offence, committed within this state, be subject to punishment in the same manner and to the same extent as if the first conviction had taken place in a court of this state." Thus by implication is expressed the opinion of the legislature that the general words of the eighth section, *supra*, would not.

meet the case provided for in the tenth section. In Massachusetts, after a statute extending the prohibition against a second marriage, under circumstances before stated, to inhabitants of that state going out of it to evade the law, it was held that if, in any event, the foreign marriage could be invalidated, it could not be without proof of the intent made necessary by statute. Nor without it could there be a conviction for polygamy: *Comm. v. Lane*, 113 Mass. 458. A similar distinction exists under the English law. In 1 Hale P. C. 662, the case is stated of a woman who married in England, and afterward married abroad during her husband's life. It was held she was not indictable under the statute of the former country for bigamy, for the offence was committed out of the kingdom, and the act did not in express terms extend its prohibition to subjects abroad. It is otherwise, however, in regard to certain offences committed in other countries by Englishmen against their government, viz., murder and slave-trading, because the statutes have so provided: *Warrender v. Warrender*, *supra*. Now if the criminal court has no jurisdiction to punish the act when committed out of the state, how has the civil court jurisdiction to prohibit the doing of the act out of the state. The consequences are the same in either case, and are prescribed by the same statute. Whether a man is punished by fine and imprisonment, or by disgrace to himself and the woman he married—the bastardy of his children—is a difference in degree only. The severer punishment is in the last alternative. Can the court imply the right to inflict it? Can it exist unless given in express language? I think not. The statute does not in terms prohibit a second marriage in another state, and it should not be extended by construction. The mode of construction contended for by the respondent, if applied to the statutes of treason and duelling and the punishment of second offences, would make useless those provisions which relate to the conduct of a citizen out of the state, or the commission of crime in this state by one convicted in another state. Can they be disregarded, or the legislature charged with useless enactments? On the contrary, we must give weight and meaning to them; to their presence in those laws and their absence in the one of marriages. The difference is essential, and the varying language cannot be disregarded. There is first a prohibition broad as in the act before us, wide enough to take in all persons within the state, and prohibiting certain acts—a per-

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sonal prohibition. Not content with that, the statutes go further and extend the same consequences to those acts when committed out of the state. These provisions are lacking in the law before us. When, therefore, we consider the legislation of this state before referred to, and the general rules regulating the territorial force of the statutes, we cannot but regard the omission to provide by law for cases like the present as intentional; but if not, in the language of Lord ELLENBOROUGH, in *Rex v. Skone*, 6 East 518. "we can only say of the legislature, *quod voluit non dixit*." This view is sustained by the course of decision and legislation in Massachusetts. In *Medway v. Needham*, *supra*, the plaintiff sued for the support of certain paupers, one Coffee and his wife, alleged to have their legal settlement with the defendant. The only question on the trial, or the subsequent hearing before the whole court, respected the validity of the marriage. He was a mulatto, and his supposed wife a white woman. They were inhabitants and residents of Massachusetts at the time of their marriage, and the statement is that "as the laws of the province at that time prohibited all such marriages, they went into the neighboring province of Rhode Island, and were there married according to the laws of that province," and returned immediately to their home. Both courts hold the marriage good. The statute regulating marriages in Massachusetts was at that time like our own, but the court placed their decision upon the general principle that a marriage good according to the laws of the country where it is entered into shall be valid in any other country, PARKER, C. J., saying: "This principle is considered so essential that even where it appears that the parties went into another state to evade the laws of their own country, the marriage in the foreign state shall be valid in the country where the parties live;" and referring to the statute which declares second marriages absolutely void, says: "They are only void if contracted within this state:" *West Cambridge v. Lexington*, 1 Pick. 506, involved the rights of infant children of Samuel Bemis, paupers, to public support in that state. The question turned upon the validity of his second marriage. His first had been dissolved for his adultery. Afterwards, and while his former wife was living, he married in New Hampshire, and the children were from that union. The court held that if the marriage had been contracted in Massachusetts, it would be unlawful and void; but that the laws of no country have

force outside of its own jurisdiction, and, therefore, one who by reason of his offence against it is disabled from contracting another marriage, may lawfully marry again in a state where no such disability is attached to the offence; and further, having a right to marry there, he could not, while there, violate the statutes of Massachusetts against polygamy. It was therefore held that the children were legitimate, their settlement to be where that of their father was, and the town entitled to recover for their support. The circumstances of *Putnam v. Putnam*, 8 Pick. 433, are singularly like those before us, and it was held that although the second marriage was a clear case of evasion of the laws of the Commonwealth, it was valid upon the general rule referred to in the cases already cited. The court also says: "If it shall be found inconvenient or repugnant to sound principle, it may be expected that the legislature will explicitly enact that marriages contracted within another state—which, if entered into here, would be void—shall have no force within this Commonwealth." There is thus recognised a necessity, discussed earlier in this opinion, for express legislation, if the citizen is to be held bound by the laws of this state for acts performed by him outside its limits. Legislation to this end was afterwards had; Rev. Stat. of Mass., ch. 75, sect. 6; Tenn. St., ch. 106, sect. 6. Referring to provisions of the act making void marriages between certain parties, or by persons in prescribed conditions, or under certain circumstances, it declares, "where persons, resident in this state, in order to evade the preceding provisions, and with an intention of returning to reside in this state, go into another state or country and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this state." It is not necessary to consider the extent or scope of this statute. It has been discussed by the courts of this state, and is said by DEWEY, J., in *Commonwealth v. Hunt*, 4 Cush. 49, "to have been intended to meet this class of cases—that is, of individuals fraudulently attempting to evade the laws of Massachusetts, so far as respects persons divorced for adultery—and to declare such marriages by the guilty party to be void in this Commonwealth;" or as HUBBARD, J., says, in *Sutton v. Warren*, 10 Metc. 453, "The only object of this provision is, as stated by the commissioners in their reports, to enforce the observance of our own laws upon our own citizens, and not suffer them to violate regulations founded in a just

regard to good morals and sound policy." We have no law in relation to this subject similar to that of Massachusetts, or our statutes before cited, in reference to duelling and treason. There is nothing in the statute to indicate an intention of the legislature to reach beyond the state to inflict a penalty. Nor can I discover an intent to so impress the citizen with the prohibition as to make an act which is innocent and valid where performed an offence when he returns to this state, and himself a criminal for performing it. Every presumption is against such intention. The respondents rest their case upon the general words of the statute. These, taken in their natural and usual sense, would undoubtedly embrace the case of the appellant. "No second * * * marriage shall be contracted by any person during the lifetime of any former wife of such person." "Every such marriage shall be absolutely void." "No defendant convicted of adultery shall marry again until the death of the complainant." Equally broad are the provisions of the criminal law declaring the punishment of the offender. They would comprehend every second marriage wherever celebrated, and take in the citizens of every state. It cannot be denied that they are subject to explanation and restraint (*Mosher v. People, supra*), and the principle upon which it rests shows the criminal law to have no application to a marriage out of the state. The same rule was applied in *Sims v. Sims*, 75 N.Y. 466, where, after a very full discussion of the question involved, it was decided that the provision of the revised statutes (3 R. S. 994, sect. 23), declaring a person sentenced upon a conviction of a felony to be incompetent as a witness, does not apply to a conviction in another state; that it has reference only to a conviction in this state. The conviction was in Ohio. It was assumed that the convict would have been incompetent as a witness in that state. Suppose a judgment here followed his evidence, and it was afterwards prosecuted in Ohio. Would it be competent in defence to show that it was obtained upon evidence inadmissible by the laws of Ohio? Clearly not. And the reason is stated in the case cited. "The disqualification is in the nature of an additional penalty following and resulting from the conviction, and can not extend beyond the territorial limits of the state where the judgment was pronounced." He was therefore, a competent witness in the state of New York. There is, in principle, a close analogy between the case I have supposed and the one before us. In each

there is personal disqualification—in one, to marry; in the other, to testify. In neither case does the disqualification arise from any law of nature or of nations, but simply from positive law. Each deprived the offender of a civil right. Now in case of the witness, his testimony results in a judgment, a contract of record, to which, when it reaches Ohio, full effect must be given, and for its enforcement the machinery of the law in that state put in motion. In the other case, that in hand, a contract is entered into by the offender, which is a good contract under the laws of the state where made. If so, it should also follow that to each party thereto and to their issue every right and privilege growing out of the relation so established must attach. When, therefore, they return to this state with the evidence of that contract, can the courts do more than in the other case? Are they not limited to the inquiry whether the contract was valid in the state where made? And if it was, how can they deny to the child its inheritance? Let me go a little further. Suppose, on the day the decree of divorce was granted, Barker had also been convicted and sentenced for felony. He would then have been subject not only to the statutes above cited, but to that other which declares “that no person sentenced upon a conviction for felony shall be competent to testify in any cause:” 3 R. S. 994, sect. 23. Disqualified, therefore, to marry or to testify, he does both in Connecticut, brings back to this state the judgment record and the marriage contract. If the first can not be impeached because of his sentence, neither, as it seems to me, can the other because of his “conviction.” And for the same reason—viz., that stated by Greenleaf as the result of the weight of modern opinion, sanctioned by this court in *Sims v. Sims*, *supra*, that personal disqualifications arising, not from the laws of nations, but from positive laws, especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originated.

Second. Nor are we, in the absence of express words to that effect, to infer that the legislature of this state intended its law to contravene the *jus gentium*, under which the question of the validity of a marriage contract is referred to the *lex loci contractus*, and which is made binding by consent of all nations. It professedly and directly operates on all. To impugn it is to impugn public policy; and while each country can regulate the status of

its own citizens, until the will of the state finds clear and unmistakable expression, that must be controlling. "Where," says MARSHALL, C. J. (*United States v. Fisher*, 2 Cranch 380), "rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

Our conclusion is that as the marriage in question was valid in Connecticut, the appellant, Rose Van Voorhis, is a legitimate child of Barker, and as such entitled to share in the estate of the testator.

The judgment should be reversed, and a new trial granted, without costs to the plaintiffs or Sarah A. Brintnall, but with costs to the appellant, Rose Van Voorhis, and to respondents, Ella and Elias, to be paid out of the estate.

All concur, except FOLGER, C. J., not voting.

The principal case must be regarded as determining for the state of New York, a very serious question in the law of marriage. Few graver questions are brought before the courts for determination, than those relating to the validity of marriage and the legitimacy of offspring. Any adjudication upon so important a subject, and emanating from so distinguished a court as the New York Court of Appeals, must necessarily be of great interest to the profession, and will be examined with care, in both America and England.

It is laid down in the foregoing opinion, that "it is a general rule of law, that a contract entered into in another state or country, if valid according to the law of that place, is valid everywhere." And cases are cited to the effect that a marriage valid where celebrated, is valid everywhere. It is submitted, however, with the greatest deference, that while the general rule may be as stated, it is not applicable to the state of facts existing in the particular case, and that the conclusion announced, cannot be sustained upon the authority of the English

or American cases. In *Brook v. Brook*, decided in the House of Lords in 1861, (9 House of Lords Cases 193), the Lord Chancellor said: "There can be no doubt of the general rule, that a foreign marriage, valid according to the law of a country where it is celebrated is good everywhere." But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated. This qualifi-

cation upon the rule, that a marriage valid where celebrated is good everywhere, is to be found in the writings of many eminent jurists who have discussed the subject. * * * It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions. In this case a marriage celebrated in Denmark, between persons domiciled in England, and which was valid according to the law of Denmark, was held void in England. The man had married the sister of his deceased wife, and the parties had gone to Denmark to evade the English law forbidding such marriages. The latest authoritative exposition of the English law is to be found in the opinion pronounced in the Court of Appeals as late as 1877, in *Sottomayor v. De Barros*, Law Rep., 3 Prob. 1. In that case it is said: "But it is a well recognised principle of law, that the question of personal capacity to enter into any contract, is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnized, must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile." And it was held that where a marriage was celebrated in England between citizens domiciled in another country, the marriage would be held void in England, if the parties were prohibited from marrying by the law of their

domicile, and in an English work on the law of domicile, but recently published, we find it laid down as follows: "The validity of a marriage depends on two conditions: first, on the *capacity* of the parties to marry each other; secondly, on the celebration of the marriage in due form. The capacity of each of the parties to a marriage, is to be judged of by their respective *lex domicilii*. Dicey on Domicile, p. 202.

There are English cases which might seem at first blush, not to warrant the principle thus laid down, but a broad distinction exists between such cases, which must not be lost sight of. For instance a marriage between an English subject domiciled in England, and a foreigner, would be held valid in England, although the foreigner might be prohibited from contracting the marriage by the law of his domicile. And this upon the principle that no country is bound to recognise the laws of a foreign state, when they work injustice to its own subjects: *Sottomayor v. De Barros*, L. R., 3 Prob. D. 1, 6, 7; and s. c., on further hearing, 19 Am. Law Reg. N. S. 76. Again, there are cases which recognise the validity of a marriage, where the parties have married away from their own country, for the purpose of evading the requirements of the law of domicile as to the consent of parents. But it is to be remarked, that the consent of parents, or others necessary to the validity of a marriage, are considered as part of the ceremony or form of marriage. See Dicey on Domicile, p. 203.

In the opinion in the principal case, much stress is laid upon the Massachusetts cases, and especially upon the case of *Medcay v. Needham*, 16 Mass. 157 (1819), which was identical in principle with the one under discussion. It is interesting, therefore, to note the criticism passed on that case in the House of Lords. "I cannot think," said the Lord Chancellor, "that it is entitled to much weight, for the learned judge ad-

mitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which the forms only, of celebrating the marriage in the country of celebration and in the country of domicile were different; and he took the distinction between cases where the absolute prohibition of the marriage is forbidden, on mere motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognised as lawful." And Lord CRANWORTH, at the same time, remarked, "I also concur entirely with my noble and learned friend, that the American decision of *Medway v. Needham*, cannot be treated as proceeding on sound principles of law." And as to *Sutton v. Warren*, 10 Metcalf 451 (1845), also cited in the principal case, the Lord Chancellor said: "I am sorry to say, that it rather detracts from the high respect with which I have been in the habit of regarding American decisions, resting upon general jurisprudence. * * * I am bound to say that the decision rested on a total misapprehension of the law of England. * * * This decision, my Lords, may alarm us at the consequences which might follow from adopting foreign notions on such subjects, rather than adhering to the principles which have guided us and our fathers, ever since the Reformation." See *Brook v. Brook*, 9 House of Lords Cases 193. Mr. Burge, too, in his *Commentaries on Colonial and Foreign Laws*, p. 188, disapproves the Massachu-

setts cases, and maintains that the doctrine of the *lex loci* ought not to be extended to make valid the marriage, where the party retains his domicile in the country in which the prohibitory law prevails, and resorts to another state for the purpose of evading the law of his own.

The conclusion reached in the principal case is not only opposed to the doctrine of the English Court of Appeal, and of the House of Lords, but it is equally opposed to the weight of authority in this country.

The Supreme Court of North Carolina in 1854, passed upon a state of facts in all respects similar to those existing in the principal case. A divorce was obtained in North Carolina, and the guilty party was prohibited from marrying under a statute similar to the one in New York. The parties left the state for the purpose of contracting a marriage in evasion of the law, and having been married in South Carolina, where such a marriage was not prohibited, returned into North Carolina. The courts of the latter state held the marriage void. "Although it be true," said RUFFIN, Ch. J., "that generally, marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws, and their operation on its own citizens, as not to allow them to be evaded by acts in another country, done purposely to defraud them. It cannot allow such acts abroad, under the pretence that they were lawful there, to defeat its own laws at home, in their operation upon persons within her own territory." *Williams v. Oates*, 5 Ired. 535. The subject has recently been before the same court, and the former ruling was adhered to. *State v. Kennedy*, 76 N. C. 251 (1877). In this last case *Brook v. Brook*, *supra*, is approved, and the Massachusetts case of *Medway v. Needham*, *supra*, noticed and denied. "As to the formalities of marriage, the *lex loci* will govern. But when the law

of North Carolina declares," said the court, "that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go, so long as they remain domiciled in North Carolina. And we conceive that it is immaterial whether they left the state with the intent to evade its law or not, if they had not *bona fide* acquired a domicile elsewhere at the time of the marriage. * * * A law like this of ours would be very idle if it could be avoided by merely stepping over an imaginary line." The same principle was announced in Louisiana in 1855, in *Dupre v. Executor of Boulard*, 10 La. Ann. 411. It was there held that a marriage celebrated in France, between parties domiciled in Louisiana, and in evasion of the law of domicile, was void. So in Tennessee in *State v. Bell*, 7 Baxter 9 (1872), where the court declares that the principle that a marriage valid where celebrated, is valid everywhere, is confined to the manner and form of the marriage, and does not apply to the capacity of the parties to contract the marriage. And it was there held that where a man married a woman of color in Mississippi in evasion of the law of Tennessee, and returned to the latter state, he could be indicted, although the marriage was valid in Mississippi. The same doctrine is announced in Virginia in *Kinney v. Commonwealth*, 30 Gratt. 858 (1878). In this case a negro and a white woman domiciled in Virginia, went into the District of Columbia, and were married in evasion of the law of their domicile. Upon their return the marriage was held void. We do not understand that in any of these cases, the statute expressly declared the marriage void, although entered into in another state. They are decided upon the authority of *Brook v. Brook*, *supra*, holding that the *lex domicilii* must determine the capacity of the parties. In the Virginia case, last cited, *Medway v. Needham*, as in most of the

other cases, was expressly referred to, and openly repudiated as having been decided upon incorrect principles. It was admitted in a recent case in Massachusetts, in *Commonwealth v. Lane*, 113 Mass. 458, 465 (1873), that *Medway v. Needham* was decided upon the authority of English cases, in which the question concerned the *form* of the marriage, and not the *capacity* of the parties. In *Putnam v. Putnam*, 8 Pick. 433 (1829), the court in following *Medway v. Needham*, declared it was aware of all the objections to the ruling made in that case, but that the court in making it "adopted the rule of the law of England on this subject." *Medway v. Needham* must therefore be regarded as based upon a misconception of the extent of the principle, that a marriage valid where celebrated is valid everywhere.

Next to the Massachusetts cases, the case chiefly relied on in this country, by the advocates of the doctrine enunciated in the principal case, is *Stevenson v. Gray*, 17 B. Monr. 193 (1856). It is true that an opinion was expressed in that case, that a marriage, contracted under a similar state of circumstances to those existing in the principal case, would be valid in the place of domicile, and *Medway v. Needham* was referred to as an authority for the opinion. But the facts of the case did not make necessary the expression of any opinion upon that point, and the court expressly declared that no conflict could arise, upon the facts, "between the *lex loci contractus* and the *lex rei sitæ*, or between the *lex domicilii* and either or both of the others," as the marriage, even though it had been celebrated in Kentucky, would not have been, under the peculiar phraseology of their statute void, but only voidable. That after death of one of the parties, the marriage could not be avoided, and therefore the children must be regarded as legitimate. And so in the more recent case of *Dannelli v. Dannelli*, 4 Bush 51 (1868), where it

was sought to question the validity of a marriage which was said to have been contracted in Switzerland, in evasion of the law of Lombardy, the place of domicile, the same court declared: "As both reason and authority, regard the assent of parties, and the consummation thereof, by cohabitation, as a legal valid marriage, unless prohibited by the municipal laws of the country where celebrated, before we could pronounce this marriage as invalid, the laws of Switzerland making it so would have to be made known to us in a legal manner," which had not been done. It is thus apparent that in neither of these cases was it possible for the court to have held the marriage void as violating the law of the domicile.

Dickson v. Dickson, 1 Yerger (9 Tenn.) 110 (1826), is sometimes cited as sustaining doctrine similar to that announced in the principal case. But in that case the party, although divorced in Kentucky, and rendered incompetent to marry, had acquired a new domicile in Tennessee, and there married a man whose domicile was in that state, where they continued to reside until his death. Both parties were therefore qualified by the law of their domicile to contract the marriage. Even had the woman been incompetent the courts of Tennessee, as already pointed out, were under no obligations to hold the marriage void, inasmuch as this would be permitting the laws of Kentucky to work an injustice to the husband whose domicile was in the former state. And in *Fuller v. Fuller*, 40 Ala. 301 (1866), a similar state of facts existed, and a similar ruling was made. In neither case is there even a *dictum* in favor of the ruling made in the principal case. But such *dictum* may be found in *Van Storch v. Griffin*, 71 Penn. St. 240 (1872).

It is said in the principal case that a contract entered into in another state, if valid according to the law of that state, is valid anywhere. And the court imme-

diately adds that a marriage valid where celebrated, is valid everywhere. There is no doubt of the correctness of both propositions. The difficulty is that neither principle applies to the state of facts before the court. We have tried to show that the last principle does not govern cases, in which a marriage has been contracted out of the state of the domicile, and in evasion of its laws prohibiting the parties from marrying. But if the question is to be tried upon principles of law which govern in cases of ordinary contracts, we think the same result is reached, for we find it laid down as elementary law in all the text writers, that no state is bound to enforce contracts injurious to its own interests, or in fraud or evasion of its laws, though made outside of its jurisdiction, and valid when and where made. Story's Conf. of Laws, sect. 244. And see, *Bancho v. Mansel*, 47 Me. 60 (1859); *Smith v. Godfrey*, 8 Foster (N. H.) 381, (1854). And this was admitted by Chief Justice PARKER in delivering his opinion in *Medway v. Needham*. "This doctrine is repugnant," he said, "to the general principles of law relating to contracts; for a fraudulent evasion of the laws of the country, where the parties have their domicile, could not, except in the contract of marriage, be protected under the general principle."

Great stress was also laid in the principal case, upon the fact that the legislature, while expressly declaring in the statutes of treason and duelling, that those offences should be punished though committed outside the state, yet failed to declare in the statute of marriages that a marriage contracted outside the state should be void. There is, however, a great distinction. It has never been deemed necessary to incorporate such a provision in the marriage laws, for the simple reason that such a provision would simply be in affirmance of the general principle, that all contracts entered into in another state for the fraudulent evasion

of the laws of the place of domicile where the contract is to be performed are void *ab initio*, and will not be recognised in the courts of the home state. Marriage is a civil contract for certain purposes, and is to be performed in the place where the parties reside, and it was not supposed that in this, the most important of all contracts to the welfare of the state as well as to the individual, the courts would recognise as valid, a marriage contract entered into in fraud and evasion of its laws, absolutely prohibiting it as contrary to the public weal. But on the other hand, if the state seeks to punish a criminal act, done by its own citizens outside of the state, it is equally a well settled principle of law, that it is necessary to expressly enact, that such acts shall be deemed punishable as though committed within the state.

In the principal case, the disability to marry is spoken of as a *penalty*, and that as such it can have no extra-territorial force. But in *Elliott v. Elliott*, 38 Md. 357, 363 (1873), the objection was raised to a law empowering the court in its discretion to decree in case of divorce, that the guilty party should not marry during the lifetime of the other party, that it was *ex post facto* in so far as it applied to a person who committed adultery before the act went into operation. The court, however, held otherwise. "It did not impose," so said the court, "any new punishment or penalty upon the adulterer, but simply withheld from him relief which he was never entitled to claim, and left him where he was before the decree was passed; under the disabilities of his marriage contract which before existed, or which are imposed, not by the Act of Assembly, but grow out of the marriage contract itself into which he had voluntarily entered." If such a decree leaves the guilty party "under the disabilities of his marriage contract which before existed," he certainly has no more right to marry after

such a decree than he had before the decree was pronounced. And as the courts would be compelled to hold a marriage void contracted out of the state and before the divorce, so would it also be equally compelled to hold the marriage void contracted out of the state after the divorce. The principle "*Leges extra territorium non obligant*" would not apply.

The courts will not allow husband and wife to obtain a divorce in fraud of the law of their domicile, and if both parties by consent go into another state merely for the purpose of obtaining a divorce, and with the intent of returning to their former domicile after such divorce is obtained, upon their return, the courts of the place of domicile hold such a divorce null and void. *Harrison v. Harrison*, 20 Ala. 629; *State v. Arming-ton*, 25 Minn. 29, 37 (1878); *People v. Dawell*, 25 Mich. 247 (1872). And this upon the principle that to each state belongs the exclusive right and power to determine for itself the matrimonial status of all its resident and domiciled citizens. The opinion of Mr. Justice COOLEY, in the Michigan case, above cited, is exceedingly able and of great interest. He says "there are three parties to every divorce—the husband, the wife, and the state—and the fact that the first two, consent to the jurisdiction of the courts of another state cannot give validity to the divorce, as the third party, the state where the parties are domiciled has not assented." So we say, there are three parties to every marriage,—the man, the woman, and the state where the parties are domiciled—and the fact that the first two agree to assume the matrimonial relation, cannot create a lawful marriage, if the third party by prohibiting the marriage refuses to assent thereto.

From the cases already cited we deduce these principles:

1. That a marriage valid where celebrated, is valid everywhere, so far as all questions of *form* are concerned.

2. That while the *lex loci* governs in questions of form, the *lex domicilii* determines the capacity of the parties to enter into the marriage contract.

3. That statutory provisions relating to the consent of parents, &c., go to the form of the marriage, and not to the capacity of the parties.

4. That where a marriage is contracted between parties whose domicile is different, the courts of the place of domicile will recognise the validity of the marriage in favor of its own citizen, although the other party may be disqualified by the law of the foreign domicile.

5. When a new domicile is acquired in good faith, the former incapacity ceases, and the capacity of the party must be determined by the law of the new domicile.

In addition to these principles we briefly note :

1. That polygamous and incestuous marriages are everywhere void. *Wightman v. Wightman*, 4 Johns. Ch. 343; *Hutchins v. Kimmell*, 31 Mich. 126, 134; *Sutton v. Warren*, 10 Metc. 451; *Commonwealth v. Lane*, 113 Mass. 458, 463; *State v. Ross*, 76 N. C. 245.

2. That marriages between infants are voidable and not void. *Cooley v. State*, 55 Ala. 162; *Beggs v. State*, 55 Id. 108; *Frost v. Vought*, 37 Mich. 65. In the case last cited, it is held that the Michigan statute rendering males of eighteen and females of sixteen, competent to contract marriage, makes the marriage actually entered into by them valid, but that it does not empower such persons while under the age of twenty-one to make valid executory contracts of marriage, for breach of which suits may be brought.

3. That marriages between persons, one of whom is insane at the time of marriage, are void. *Middleborough v. Rochester*, 12 Mass. 363; *Waymire v. Jetmore*, 22 Ohio St. 271; *Crump v. Morgan*, 3 Ired. Eq. 91; *Johnson v. Kin-*

cade, Id. 470; *Powell v. Powell*, 18 Kans. 371. See *Stuckey v. Mathes*, 31 N. Y. Supt Ct. 461. That it is voidable. *Cole v. Cole*, 5 Sneed 57; *McKinney v. Clarke*, 2 Swan. 321.

4. That marriages between slaves were considered void. *Stikes v. Swanson*, 44 Ala. 633; *Cantelon v. Hood*, 56 Id. 519; *Smith v. State*, 9 Id. 996; *Malinda v. Gardner*, 24 Id. 719; *State v. Samuel*, 2 Dev. & Bat. L. 177; *Howard v. Howard*, 6 Jones L. 235; *Hall v. United States*, 2 Otto 27; *Ewing v. Bibb*, 7 Bush 654; *Steward v. Munchandler*, 2 Id. 278; *McReynolds v. State*, 55 5 Cald. (Tenn.) 18.

5. That marriages between Indians according to Indian customs are considered valid, although the husband has the right to dismiss the wife at his volition, and the tribe live within the state limits. *Boyer v. Dively*, 58 Mo. 510; *Wall v. Williamson*, 11 Ala. 839; *Morgan v. McGhee*, 5 Hump. 13; *Johnson v. Johnson*, 30 Mo. 72.

6. That a marriage procured through the fraud of one party, is generally said to be void. See Schouler Dom. Rel. 35. Reeves Dom. Rel. 206; 2 Kent's Com. 767. 1 Bishop on Mar. and Div. sect. 115. In *Tompert v. Tompert*, 13 Bush 326 (1877), the Kentucky court repudiates this doctrine, and declares it is only voidable and not void. And see *Guilford v. Oxford*, 9 Conn. 326.

7. That the statutory provisions requiring that no marriage be celebrated until after a license has issued, &c., are directory merely, and will not invalidate a marriage performed without compliance therewith, in the absence of express provisions declaring such marriages void. *Ely v. Gammel*, 52 Ala. 584, 586; *Beggs v. State*, 55 Id. 112; *Parton v. Hervey*, 1 Gray 119; *Milford v. Worcester*, 7 Mass. 48; *Cargile v. Wood*, 63 Mo. 501; *Holabird v. Ins. Co.*, 2 Dillon 167; *Rundle v. Pegram*, 49 Miss. 751; *Hutchins v. Kimmell*, 31 Mich. 133. But where the statutory conditions

have not been complied with, it is held that there must be some independent proof of an actual and voluntary consent, indicating the existence of a deliberately recognised marriage. And positive evidence of non-assent is of weight against an irregular ceremony. *Kopke v. People*, 43 Mich. 45 (1880).

8. That a marriage entered into through duress is void, but not when fear arises from an arrest and prosecution for bastardy. *Williams v. State*, 44 Ala. 24; *Honnett v. Honnett*, 33 Ark. 156. See *Willard v. Willard*, 6 Baxter (Tenn.) 298.

9. That there is nothing in the Constitution of the United States which prevents the states from declaring all miscegenetic marriages void. *State v. Hairs-ton*, 63 N. C. 451; *State v. Reinhard*, 63 Id. 547; *Kinney v. Commonwealth*,

30 Gratt. 858; *Green v. State*, 58 Ala. 190.

We shall conclude this note with the following quotation from Story's Conf. of Laws, p. 178 (7th ed.): "If the incapacity of the parties is such that no marriage could be solemnized between them, * * * and without changing their domicile they go into some other country where no such limitation or restriction exists, and there enter into the formal relation with a view to return and dwell in the country in which such marriage is prohibited by positive law, it is but proper to say, that a proper self-respect (of the state or government in prohibiting such a marriage) would seem to require that the attempted evasion would not be allowed to prevail."

HENRY WADE ROGERS.

Supreme Court of Pennsylvania.

WIREBACH'S EXECUTOR v. FIRST NATIONAL BANK OF EASTON.

A lunatic who is an accommodation endorser without consideration upon a promissory note, and who has derived no advantage from his endorsement, either to himself or his estate, is not liable to a *bona fide* holder, although the latter had no knowledge of the lunacy.

Error to the Common Pleas of Northampton county.

Assumpsit against the executor of Wirebach, upon a promissory note drawn by one Christman to the order of Wirebach, and endorsed by the latter. Plea, non assumpsit.

Upon the trial the following facts appeared: In January 1876, Wirebach endorsed a note of \$4000 jointly with Richards and Christman for the accommodation of Stocker & Co., a firm doing business in South Easton, which note was discounted by the First National Bank of Easton. Besides this note of \$4000, the bank held at the time ten other notes of Stocker & Co., upon which Wirebach was not an endorser, but upon which Richards and Christman were endorsers, and these notes were carried along from time to time in different amounts, and maturing at different dates. In the beginning of December 1876, after one of the notes fell due and went to protest, Christman had an interview with the

president of the bank. It was then arranged that the said notes, eleven in number, should be replaced by one note, and that Christman should procure Wirebach to become endorser on the said note, and that Richards and Christman should be the drawers. Stocker & Co. were not to be parties to the new note.

In pursuance of this agreement, Christman, on December 7th 1876, met Wirebach by appointment, and went with him to the bank, where, in the presence of the president, who had prepared a calculation of the total amount of the eleven notes, the note in suit was duly executed for \$10,075.

The defendant set up that both before and at the time of the execution of the original note and the renewal, Wirebach was unsound in mind and incapable of contracting, and that the bargain was unconscionable, and had been obtained by undue influence and fraud. The testimony as to the insanity of Wirebach was conflicting, but there was no direct testimony on the part of the defendant that the officers of the bank knew of Wirebach's condition, except in so far as they might have inferred it from his actions while the transaction was being carried on.

Verdict and judgment for the plaintiff. The defendant took this writ.

Edward J. Fox (*W. S. Kirkpatrick* with him), for the plaintiff in error, cited, *Mitchell v. Kingman*, 5 Pick. 431; *Taylor v. Dudley*, 5 Dana 310; *Thornton v. Appleton*, 29 Maine 298; *Webster v. Woodford*, 3 Day 100; *Grant v. Thompson*, 4 Conn. 204; *Morris v. Clay*, 8 Jones 216; *Lazell v. Pinnick & Matson*, 1 Tyler 247; *Seaver v. Phelps*, 11 Pick. 304; *Bank v. Moore*, 28 P. F. Smith 407.

W. W. Schuyler (*William Mutchler* with him), for the defendant in error, cited, *La Rue v. Gilkyson*, 4 Barr 375; *Beals v. See*, 10 Id. 56; *Bank v. Moore*, 28 P. F. Smith 407; *Molton v. Camroux*, 2 Exch. 487; *Elliot v. Ince*, 7 DeG., M. & G. 487; *Wilder v. Weakley*, 34 Ind. 181; Benjamin on Sales, sect. 29, 1 Am. Ed.

The opinion of the court was delivered by

TRUNKY, J.—Where a person fairly and in good faith sells property, or loans money to a lunatic who appears to be sane and

is not known by the vendor or lender to be insane, and who has not been found to be a lunatic by judicial proceedings, and the lunatic receives and uses the same, whereby the contract becomes so far executed that the parties cannot be placed in *statu quo*, such a contract cannot afterwards be set aside, or payment refused by the lunatic or his representatives: (*La Rue v. Gilkyson*, 4 Barr 375; *Beals v. See*, 10 Id. 56; *Lancaster County Bank v. Moore*, 28 P. F. Smith 407; *Wilder v. Weakley*, 34 Ind. 181; *Elliott v. Ince*, 7 De G., M. & G. 475, 487). In *Elliott v. Ince* it is remarked that "the result of the authorities seems to be that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding." Chief Justice GIBSON based the lunatic's liability in such cases on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it; he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes.

There can be no binding executory agreement where one of the parties is bereft of reason—a capacity to contract is absolutely necessary. An insane person is incapable of committing a crime or making a contract, yet it is common to speak of his torts and his contracts, and on many of them he is liable in a civil action. One who knowingly sells goods to an insane person, necessary for his use, may recover their value on the same principle that an infant is liable for necessities he purchases. His liability for necessities and suitable articles is deemed rather a benefit than a disadvantage to him.

It is noticeable that in this Commonwealth, where the lunatic has been held liable, there was neither imposition nor want of full consideration for the amount of liability, and when not for necessities. the opposite party had no knowledge of the lunacy. Thus, in *Lancaster County Bank v. Moore*, *supra*, stress was put on the fact that the bank had no knowledge of Moore's insanity, and in good faith loaned the money which was placed to his credit and checked out by him. It was held to be within the doctrine of *Beals v. See*, that the contract was executed so far as the consideration was concerned, and that the rule which prevents insane persons obtaining the property of innocent parties and retaining both property and price, required payment of the note: *Snyder v.*

Laubach, 7 W. N. C. 464, is where York's endorsement of the note was merely a renewal of an endorsement made when he was unquestionably of sound mind; and it was held that as he was clearly liable on the note of which the note in suit was a renewal, there was full consideration, and the case was within the decision in *Lancaster County Bank v. Moore*. The consideration was a debt for the amount of the renewal note. So in *Kneedler's Appeal*, 37 Leg. Int. 504, a judgment entered on a bond by virtue of a warrant of attorney was allowed to stand because the lunatic, acting by advice of counsel, received the full consideration which he prudently applied in payment of his undisputed debts, and the plaintiff had no knowledge of the insanity when the money was loaned. Of like purport are every one of the cases decided elsewhere, which are cited and relied on by the defendant in error. In most if not all cases where an insane person has been held answerable as if his contract were binding, he received and enjoyed an actual benefit from the contract.

The question now presented is: Will an action lie on the accommodation endorsement of a promissory note by a lunatic? If the determination of this was not made, it was very clearly indicated in *Moore v. Hershey*, 9 Norris 196. There the action was by an endorsee against the maker of a promissory note, and evidence was offered to prove that the maker had received no consideration for the note, which fact the plaintiff had admitted in conversation, proof having been made that the maker was insane, but the offer was rejected, the court below ruling that as the note in suit was commercial paper and the plaintiff a holder for value, the consideration could not be inquired into. This was held to be error. PAXSON, J., said, "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by madmen. * * * The true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the *status* of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud and upon a proper consideration."

"There must be a limit to the civil responsibility of persons of

unsound mind, otherwise their property would be at the mercy of unscrupulous and designing men."

If the holder could recover against one who was insane when he endorsed or made the note without consideration therefor, no wider door could be opened for the swindler to despoil such helpless persons of their estates. An infant who makes or endorses a note may, by his representative, plead his infancy as a complete defence. In like manner, a lunatic may plead insanity and want of consideration. The consideration respects himself, not the holder, who may have given value to his endorser. If the fact that the holder had paid value were enough, the lunatic could not defend for fraud upon him or for want of consideration. Then an innocent holder could recover, though the judgment would sweep away the lunatic's entire estate, and he had not been benefited a farthing. Nor would a nominal sum be sufficient. It is said that the law protects those who cannot protect themselves; but it would be sorry protection if one holding a valid note against a helpless man for \$4000 could get it renewed for \$10,000, and recover the full amount of the renewal-note. The consideration must be fair and conscionable, and then it is proper. When it is a pre-existing debt, or money loaned, its measure is certain; and the insane man is liable for no more than the amount of such debt or loan. The holder of a madman's note stands in no better position than the payee. An accommodation maker or endorser, in fact, is a surety for the principal debtor; and, when he is an infant or insane person, he or his representative may defend as in other forms of contract. We are not persuaded that commercial or public interests require an adjudication that a lunatic who signs a contract as surety, or as accommodation maker or endorser, is liable for the debt of another man.

This action is upon a note for \$10,075.92, which was given to the bank to take up notes of Stocker & Co., which were endorsed by Richards and Christman. J. C. Wirebach was accommodation endorser, and this was known to the bank. He was an endorser on one of the former notes for \$4000. It is alleged by the defence that Wirebach was incapable of making a contract by reason of insanity, not only at the date of the note in suit, but also at the date of said former note. If this fact were established the verdict should have been for defendant. And if he were sane when he endorsed the prior note, and insane at the time he endorsed the

note in suit, he is not liable for the one in suit, as it is not a mere renewal-note. The learned judge of the Common Pleas instructed the jury that, "to entitle the defendant to a verdict in this case, he must establish by satisfactory evidence that Wirebach was of unsound mind on the 7th of December 1876, and that the bank had notice or knowledge of such unsoundness." We are of opinion that it was error to rule that the defence failed, unless the bank had such notice or knowledge. This ruling pervaded the charge and answers to points of defendant; there is no occasion for special remark on each of the first nine specifications of error. We are not satisfied that the court erred in charging that there was no evidence of fraud, misrepresentation or undue influence on the part of the bank, or of fraudulent practices by Christman or Wirebach, to authorize submission of these questions. Fraud is not to be presumed from the mere fact of endorsement, even by a man feeble in mind and body. It is common for one friend, though possessed of strong mind, to ruin himself financially by endorsing for another; and while it is very imprudent, if not rash, it has never been considered unconscionable, except when procured by some artifice or fraud, of which there must be some evidence. Were the endorser weak-minded, less evidence would be required to establish the fraud.

None of the assignments relative to the offers of testimony by the defendant are sustained. One is to the effect that the defendant was prevented from proving by Mr. Scott that Wirebach was a shrewd, intelligent business man prior to 1875. Why the court overruled the direct question is not stated, but the witness was properly examined, and testified that Wirebach's manner of conversation was good, that he was a fluent talker, intelligent, had a good memory and was an intelligent business man. All of the witnesses were allowed to testify, so far as they knew, as to his appearance, manner, conversation and acts, before and after the commencement of his alleged unsoundness of mind. Nor do we think that the insolvency of Richards and Christman, or the value of Wirebach's property at the date of the endorsement, or that Wirebach once took an interest in, and was well informed on political matters, were facts so strictly pertinent that it was error to reject them. The admissibility of such facts depends much on other testimony in the cause, and most generally safely rests in the judgment of the court where the cause is tried.

The learned judge seems to have carefully considered his rulings, and to have fairly submitted to the jury to determine as to the alleged insanity of Wirebach at the time of the endorsement. But for the single error relative to notice to or knowledge by the bank of the insanity of Wirebach, the case must go back for another trial.

Judgment reversed, and *venire facias de novo* awarded.

The doctrine that a contract entirely executory on both sides cannot be enforced against an insane person, is too well settled to need any citation of authorities. (See the cases collected in Ewell's Leading Cases on Disabilities, 525.)

As to contracts wholly or in part executed, there is, however, some difference of opinion among the authorities. In *Seaver v. Phelps*, 11 Pick. 304; s. c., Ewell's Lead. Cas. 610, decided in 1831, which was trover for a promissory note pledged to the defendant by the plaintiff while he was insane, although it did not appear that the contract to secure the performance of which the pledge was made was an executed one, the distinction between executed and executory contracts was not regarded by the court as at all material, and it was held that it was not a legal defence that the defendant, at the time he took the pledge, was not apprised of the plaintiff's being insane, and had no reason to suspect it, and did not overreach him nor practice any fraud or unfairness. See, also, *Gibson v. Soper*, 6 Gray 279; *Bond v. Bond*, 7 Allen 1; *Henry v. Fine*, 23 Ark. 417; *Somers v. Pumphrey*, 24 Ind. 238; *Chew v. Bank of Baltimore*, 14 Md. 318; *Hovey v. Hobson*, 53 Me. 453; *Fitzgerald v. Reed*, 17 Miss. 94. Were the point not settled by authority, it would seem difficult, on principle merely, to answer the position taken in *Seaver v. Phelps*, that "the fairness of the defendant's conduct cannot supply the plaintiff's want of capacity," except, perhaps, in the case of contracts for necessities, which stand

upon a different ground. The first proposition of the court in the principal case, however, is supported by the clear weight of authority, both English and American. Besides the case of *La Rue v. Gilkyson* and the other cases cited by the court, see to the same point the leading case of *Molton v. Camroux*, 2 Exch. 487; s. c., affirmed in 4 Exch. 17, decided in 1848; *Beavan v. McDonnell*, 9 Exch. 309; s. c., 10 Id. 184; *Campbell v. Hooper*, 3 Sm. & G. 153; *Hassard v. Smith*, 6 Ir. Eq. Rep. 429; *Young v. Stevens*, 48 N. H. 133; *Behrens v. McKenzie*, 23 Iowa 343; *Fitzhugh v. Wilcox*, 12 Barb. 237; *Person v. Warren*, 14 Id. 488; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Ballard v. McKenna*, 4 Rich. Eq. 358; *Sims v. McLure*, 8 Id. 286; *Matthiessen & W. Refining Co. v. McMahon*, 38 N. J. Law 537; *McCormick v. Littler*, 85 Ill. 62; *Scanlan v. Cobb*, Id. 299. See, also, *Lincoln v. Buckmaster*, 32 Vt. 658; *Long v. Long*, 9 Md. 348.

In *Molton v. Camroux*, the lunatic purchased certain annuities for his life of a society which, at the time, had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of the affairs of human life, and fair and *bona fide* on the part of the society, and it was held that, after the death of the lunatic, his personal representatives could not recover back the premiums paid for the annuities.

In *Campbell v. Hooper*, the principle of *Molton v. Camroux* was applied to a bill for the foreclosure of a mortgage as against the real and personal representatives of a mortgagor who was a lunatic

at the time of the execution of the mortgage, it appearing that the money, to secure the repayment of which the mortgage was executed, was honestly paid, and that no advantage was taken by the mortgagee, and that he had no knowledge of the lunacy when he paid the money.

In *Behrens McKenzie*, defendant was held liable on an injunction bond executed by him while insane, the enjoyment of the benefit of the writ being the consideration enjoyed by him.

The limitations upon the doctrine stated at the outset in the principal case, that, in order to hold the lunatic liable, there must have been neither imposition nor want of full consideration for the amount of liability, and that, when not for necessities, the opposite party must have had no knowledge of the lunacy, are supported alike by reason and authority. The cases all seem to concede that, except in the case of necessities, the protection of the law is not to be extended to one knowing the insanity of the party with whom he is contracting. See *Henry v. Fine*, 23 Ark. 420. And it is sufficient notice where the circumstances known in regard to the other's mental condition were such as to convince a reasonable and prudent man of his insanity, or even to put him on inquiry by which he might, if reasonably prudent, have learned the fact: *Lincoln v. Buckmaster*, 32 Vt. 658.

It is generally considered that an adjudication of insanity is sufficient to avoid subsequent contracts. In *McCormick v. Littler*, 85 Ill. 62, however, it was held that, although a person may have been adjudged insane, yet, if no conservator has been appointed, and he is in the management of his business, and there is nothing about his appearance to indicate his incapacity to contract, if he purchases an article necessary and useful in his business, at a fair

and reasonable price, the seller having no notice of his having been adjudged insane, he will be liable to pay the price he agreed to pay.

The limitation upon the rule in *Molton v. Camroux*, laid down in the principal case, that the consideration must be full, fair and conscionable, and the decision arrived at in applying the law to the facts of the principal case place the law upon this subject upon a satisfactory basis. Although the rule in *Seaver v. Phelps*, as a matter of mere principle, seems well founded, unquestionably as a matter of policy and justice the rule in *Molton v. Camroux* works out more satisfactory and just results. If a lunatic could be held liable upon an accommodation endorsement, even though in the hands of a *bona fide* holder, the protection which it is the object of the law to extend to this unfortunate class of persons would amount to nothing. The rule of *Molton v. Camroux*, as to executed contracts, with the above limitations, affords all the protection that can safely be extended to persons dealing with lunatics, without practically abolishing the disability itself; and the principal case is important as being probably the first that clearly lays down and applies this salutary limitation. In *Van Patton v. Beals*, 46 Iowa 62, it was held that an insane person who signs as surety a note given for an antecedent debt, cannot be held liable thereon, even though the person taking the note had no knowledge of the incapacity of the surety. In that case, however, *Seaver v. Phelps* is cited with approval, and no case has been found, other than *Moore v. Hershey*, cited in the principal case, which discusses the question there involved. Altogether, the decision is a satisfactory one, and will doubtless become a leading case in this branch of the law.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Missouri.

BAILE ET AL. v. ST. JOSEPH FIRE AND MARINE INSURANCE COMPANY.

A verbal agreement to insure is binding, and in case of loss will be specifically enforced against the insurer.

Henning v. United States Insurance Company, 47 Mo. 425, distinguished.

The only element of a valid contract of insurance not expressly agreed upon in this case was the risk. The insuring company, however, was only authorized to insure against fire on land and marine risks elsewhere, and the subject-matter of the insurance was a stock of goods in store. *Held*, that from this it could properly be inferred that the risk insured against was fire.

The method of enforcing specific performance of a verbal contract to issue a policy of insurance, after a loss has occurred, is not to compel the issuance of the policy but to decree payment of the money as if the policy had issued.

It is no defence to an action to compel specific performance of a contract to issue a policy of insurance that the policy, if issued, would have contained a prohibition against additional insurance, without the consent of the insurer written on the policy, and that the plaintiff had obtained additional insurance without such consent.

Where a policy contains a prohibition against additional insurance without the consent of the insurer written thereon, if notice of such additional insurance be given to an agent of the insurer and he assents thereto, it will be sufficient though his assent be verbal only.

It is no defence to an action to compel specific performance of a contract to issue a policy of insurance that the policy, if issued, would have contained a requirement that in case of loss the insurer should be forthwith furnished with proofs of loss, and that plaintiff had not complied with this requirement.

If an insurance company whose agent has made a verbal contract to issue a policy, upon being applied to for the policy by the party entitled, after a loss has occurred, refuses to issue the policy on the ground that it is not liable on the contract, it cannot afterward depend on the ground that proofs of loss were not furnished in time.

If the payee in a note receives a mortgage with the understanding that he is to hold it as a security for the payment of the note, only until he can assure himself of the solvency of another party who is offered as surety, and upon inquiry he ascertains that the proposed surety is solvent and the signature of the latter to the note is procured, and thereafter the payee receives the note and keeps it for several months without objection, the mortgage will be deemed satisfied and discharged.

Parol evidence is admissible to show that a mortgage has been fully discharged, or to explain or contradict the consideration clause.

APPEAL from Buchanan Circuit Court. Suit in equity.

The local agent of defendant at Warrensburg, solicited plaintiffs, who were merchants at that place, to take \$2500 insurance upon their stock of goods, to continue one year. Plaintiffs consented, paid the premium, and received from the agent the following receipt:

Warrensburg, December 5th 1873.

Received of Baile & Ridenour \$43.75, paid as premium on \$2500 insurance in the St. Joseph and Marine Insurance Company of St. Joseph, for which I agree to deliver a policy.

E. H. SHOTWELL, agent, &c.

Plaintiffs' application and the premium paid were forwarded by Shotwell to the home office of the company at St. Joseph, but within a few days, and before the delivery of the policy, plaintiffs' store and stock were destroyed by fire. The day after the fire plaintiffs notified the defendant, who immediately sent its secretary to Warrensburg to inquire into the case. In the prosecution of his inquiries he took the depositions of plaintiffs. Shortly after this plaintiffs demanded a policy of defendant, who refused to issue one, and denied all liability for the loss on the ground that nothing but a written or printed policy, signed by the president and attested by the secretary, could impose a legal liability on the company, and none such had ever been issued.

No formal proofs of loss were furnished to the company until after the lapse of ten months, but no objection on that score was made by the company until the filing of the answer in this case. The answer denied liability on the ground that no verbal contract of insurance was binding on defendant under its charter and the laws of the state, and further set up several affirmative defences growing out of the character and conditions of the policy that defendant would have issued if it had issued any: 1. That the policy would have contained a prohibition against additional insurance without the consent of the defendant written on the policy, and that there was a breach of such conditions. 2. That the policy would have contained a condition against misrepresentations in the application, and that there was a misrepresentation, in this, that it was stated, in the application that the plaintiffs' stock of goods was unincumbered, when in fact there was a valid subsisting chattel mortgage thereon. 3. That the policy would have contained a condition that as soon as possible after a loss the insured should render a particular account of the loss duly verified, and that this condition had not been complied with. Plaintiffs' replies to these defences sufficiently appear in the opinion.

The case was submitted to the court on the pleadings and proofs, and there was a judgment for the defendant.

Doniphan & Reed and Crittenden & Cockrell, for appellants.

H. E. Barnard, for respondent.

The opinion of the court was delivered by

SHERWOOD, C. J.—1. The validity of the contract is the first point demanding attention. The charter of the defendant company is that furnished by the general law: ch. 67, Gen. Stat., 1865, p. 353. The concluding words of sect. 1, of that chapter, require that the "conditions of all policies issued by such company, shall be written or printed on the face thereof;" and sect. 8, of the same chapter, provides that "all policies and contracts of insurance and instruments of guarantee, made by said company, shall be subscribed by the president or president *pro tempore*, and attested by the secretary." Similar language to that just quoted was passed upon by this court in *Henning v. United States Ins. Co.*, 47 Mo. 425, and it was held that with such charter and by-laws the company could make no original and oral contract of insurance. In that case, however, sect. 6 of ch. 62, Gen. Stat., 1865, was overlooked. That section, which has been on the statute-book for over thirty-five years (Stat., 1845, p. 232, sect. 8), provides that "parol contracts may be binding on aggregate corporations, if made by an agent duly authorized by a corporate vote, or under the general regulations of the corporation, and contracts may be implied on the part of such corporations from their corporate acts, or those of an agent whose powers are of a general character." Passing upon the effect of this section, it was held in the Circuit Court of the United States for the Eastern District of Missouri, in an action between the forementioned parties, that construed in the light of the general law, the charter of the insurance company did not disable it from making a binding contract of insurance without writing: *Henning v. United States Ins. Co.*, 2 Dillon C. C. 26.

This view is certainly the better one, even where there is no such general provision as that above quoted, making oral contracts of aggregate corporations valid. It must now be considered as the well-settled doctrine by nearly universal concurrence of the authorities that oral agreements of insurance are enforceable, although the charter of the company contains similar provisions to those contained in chap. 67, *supra*. The principle underlying these

decisions is this: That the right to make contracts of insurance, like any other right of contracting, exists at common law, unless prohibited by statute; that the contract of insurance having its origin in mercantile law and usage, the distinction which denies the power to enter into such a contract, except in particular modes and forms, is without foundation, and repugnant to, and inconsistent with, that general capacity of contracting which the common law concedes to every person ordinarily competent to enter into binding engagements; that the provisions of the charter of a company that they shall have the right to make contracts of insurance by the signature of a president, &c., are regarded by the courts as merely enabling and not restrictive of the general power to effect contracts in any other mode not unlawful, dictated by convenience; and that "*the distinction between a contract to insure or to issue a policy and the policy itself is obvious and constantly recognised by the courts:*" May on Insurance, sects. 14, 22, 23, 128; *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. 82; *Sanborn v. Fireman's Ins. Co.*, 16 Gray 448; *Trustees v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574; *New England, &c. v. Robinson*, 25 Ind. 536; 56 Mo. 371; *Hennig v. Ins. Co.*, *supra*. In view, however, of the broad statutory provisions heretofore cited, relating to the power of aggregate corporations to contract orally, all difficulty as to the power to make, in the present circumstances, an oral contract of insurance, vanishes. Besides that, sect. 8, *supra*, requiring the signature of the president, &c., uses no prohibitory words; relates not to agreements to insure, but only to policies when completed and ready for official signature. It is unnecessary to the proper determination of this case, that the one already cited from our own reports, and greatly relied on by the defendant, be overruled; but it is not unworthy of remark that the utterances were in that case for the most part, almost, if not altogether, *obiter*, since therein it is distinctly asserted that the contract in that instance was "nothing but a naked verbal agreement * * * sued upon. This is denied, and there is no proof of it." So that that case could have been very briefly disposed of, as having no evidential foundation requiring either judicial discussion or determination. Be that as it may, the doctrine announced in that case does not dominate this one, for the reason that that case was a suit at law on an alleged oral and completed agreement; *this*, a proceeding *in equity*, to compel

that to be done which already upon sufficient consideration had been agreed should be done. And the case under discussion expressly recognised the principle announced in *Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 319, as well as in numerous other cases cited by plaintiffs, that equity will specifically enforce "agreements to make insurance." Conceding, then, as we must, from the authorities and statutory provisions above noted, the power of the defendant company to make such an agreement to insure the goods and merchandise of plaintiffs as can be enforced in equity, was a contract possessing such necessary constituent elements as equity will recognise and enforce made in the case at the bar? We have no doubt on this score, and for these reasons: The evidence discloses a contract for a policy of insurance negotiated for between plaintiffs and defendants' local agent, the reception of and receipt for the required premium, the subject-matter insured, the amount of insurance and the duration of the policy. The only element of the contract of insurance left incomplete by the evidence is the *risk* insured against, but this is supplied by reasonable intendment and necessary implication arising from the nature of the business engaged in by the defendant company—*fire* insurance on *land* and marine insurance elsewhere, and by the circumstances and situation of the property insured. And it is competent to *infer* the *nature* of the *risk* insured against. Thus it has been held that when the hazard is *fire alone*, and the subject an unfinished vessel never afloat for a voyage, and not a subject for *marine insurance*, a contract to insure must be regarded as a *fire insurance*: *Eureka Ins. Co. v. Robinson*, 56 Penna. St. 256.

The evidence further discloses the forwarding of the premium thus received to the home office, the notification of the company by its local agent of the occurrence of the fire, the immediate coming to Warrensburg of Rice, the secretary of defendants, and its special adjuster of losses, and his taking of the depositions of plaintiffs as to the cause of the fire, the amount of goods burned and the aggregate sum of insurance, and the retention of the premium. If from these facts a contract to issue a policy cannot be implied on the part of the defendant, or even be regarded as well established by the evidence, it would be hard to conceive of a case furnishing sufficient *data* to bind with obligatory force a recalcitrant corporation. And it would be

intolerable that such corporation should ratify the acts of its local agent in manner as aforesaid, receive the consideration for issuing a policy, retain that consideration, and yet refuse to do the act for which that consideration was given.

II. We have already seen that a valid oral contract to insure having been made, equity will specifically enforce such initial, or preliminary, contract. This is done where a loss has occurred, not by actually requiring that a policy of insurance be issued, but by a decree for payment of the loss as if a policy had issued. This method of affording relief, of administering remedial justice, proceeds upon the ground of circuitry of action: *May on Insurance*, sect. 565, and cases cited; and doubtless upon further ground that equity, once possessed of a cause, will, before releasing its grasp on the *res*, avoid a multiplicity of suits by doing full, adequate and complete justice between the parties, by entering that judgment to which the party will be ultimately entitled: *Real Estate Saving Inst. v. Collonious*, 63 Mo. 290.

III. The first special defence of defendants' answer cannot prevail. There being no policy of insurance issued, the endorsing of subsequent insurance on a non-issued policy can scarcely be regarded as within the domain of possibility. The law never requires impossibilities. Defendant failing and refusing to issue a policy according to contract, cannot visit upon plaintiffs the prejudicial results arising solely out of its own non-performance: *Eureka Ins. Co. v. Robinson*, 56 Penn St. 256.

Plaintiffs not being furnished with a policy of insurance containing the condition of its issuance, it would be most unreasonable to require at their hands a compliance with those unknown conditions. No policy having been issued, nothing more, in justice to defendant, was requisite than that it be notified of subsequent insurance: *Eureka Ins. Co. v. Robinson, supra*. This was done, as shown by the testimony, the next day after the insurance was effected, by informing the local agent of such subsequent insurance in the Planters. The agent, when notified, according to the testimony of one witness, said "that was all right;" and according to the testimony of another witness, made no objection, so that, even had there been a policy of insurance actually issued, this conduct of the agent would have rendered the notice of subsequent insurance equivalent in the circumstances to an endorsement on the policy of the fact contained in such notice. The decided tendency of

modern adjudication is in this direction, and the company is held estopped from insisting on a forfeiture of the policy because the stipulation referred to has not been literally complied with: *May on Insurance*, sect. 370; *Hayward v. Ins. Co.*, 52 Mo. 181.

IV. The second special defence is as unmaintainable as the first. The testimony shows very clearly that though technically incorrect, the answer given that there was no mortgage on the insured property was actually true; and the evidence, when carefully examined, shows no conflict on this point. That evidence discloses that the deed of trust was given for a special purpose, and only for that purpose—i. e., to remain as a security for the note given by Ridenour to Congdon, for the latter's interest in the goods, until communication was had with Ohio, the endorsement of Glandner on the note obtained, and Congdon should be satisfied with the solvency of the endorser. This communication with Ohio took place. Crittenden and Cockrell, the attorneys for Congdon, employed by him for that purpose, opened a correspondence with persons in that state, ascertained, as required, that Glandner was solvent and responsible, had the note endorsed by Glandner, returned it to their client about the 1st of September 1873, who retained it in his possession without objection, though he did not enter satisfaction of the deed of trust.

In these circumstances the deed must be held as satisfied, and no longer a subsisting encumbrance at the time plaintiffs applied for insurance. Congdon's conduct on this occasion, after what had passed, must be held tantamount to an admission that he was satisfied with Glandner as an endorser, and that the deed of trust had served its purpose: 1 *Greenl. Ev.*, sect. 197.

If the note of Ridenour had been paid prior to the last-named period, no one would doubt the competency of parol evidence to show that fact. If competent in that case, then competent also in this. It is always competent to show by verbal evidence that a written agreement is "totally discharged:" 1 *Grenl. on Ev.*, sect. 302; *May on Ins.*, sect. 290; *Hawkes v. Ins. Co.*, 11 *Wis.* 188.

Again, the consideration of the deed of trust as expressed on its face was to secure the note, but the law is well settled in this state that you may, by verbal testimony, explain or contradict the consideration clause in a deed, such clause only possessing the force of

a receipt: *Fontaine v. Boatmans' Sav. Inst.*, 57 Mo. 561; *Hollocher v. Hollocher*, 62 Id. 267. No importance is to be attached to the date of the deed of trust being subsequent to the note. This is fully explained by the evidence as well as the fact that the deed of trust, through mistake of the scrivener, was drawn to extend over a longer period of time than that intended by the parties.

V. The failure of the plaintiffs to furnish formal proofs of loss cannot avail the defendants, and for these reasons: It would be most unreasonable that the plaintiffs be held bound to comply with the condition of a policy, to notify the company forthwith of any loss, when that company, by its own failure to comply with its contract and issue the promised policy, prevented the plaintiffs from knowing that condition. If the company would insist upon lack of complete performance in this particular, this can only be done when they make complete performance possible, or at least interpose no obstacle in the way of such performance: 56 Penn. St., *supra*.

The company cannot be allowed to say to plaintiffs: "If we had issued you a policy it would have contained a certain condition, and as you have not complied with that condition which the policy we would have issued would have contained, therefore you cannot recover." This is certainly a most remarkable defence to interpose. Besides, the defendant must be held as having waived the proofs being furnished by refusing to issue the policy and denying all responsibility: *Taylor v. Ins. Co.*, 9 How. 390, and cases cited; *McComas v. Ins. Co.*, 56 Mo. 573; *May on Ins.*, sects. 468-9; *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285. It must be conceded that the formal proofs offered in evidence by plaintiffs were only evidence of the fact that they were furnished to defendant and no more: *Newmark v. Ins. Co.*, 30 Mo. 160. But there was other evidence in the cause showing the extent of plaintiffs' loss.

Judgment reversed and cause remanded.

NORTON and RAY, JJ., concurred. HOUGH and HENRY, JJ., dissented.

From the time when contracts of insurance were first known, it has been customary to evidence them by a policy. Upon this general custom, some early

writers formulated a rule, that there could be no valid and binding insurance without a policy: 1 Duer on Ins. 60.

In America, this view was taken in a

few early cases. In *Head v. The Providence Ins. Co.*, 2 Cranch 166 (1804), MARSHALL, C. J., maintained that a charter which empowered a corporation to make contracts of insurance by policy, and prescribed the manner in which a policy must be executed, confined the company to that method of contracting. The question in that case was upon a verbal negotiation for the cancellation of a policy. The Chief Justice declared that a contract which could not be created except by writing, could not be otherwise cancelled.

This opinion was approved in *Cockrell v. The Cin. Mutual Ins. Co.*, 16 Ohio 148. The insured had forfeited his policy by a sale of his interest in the property. The company verbally agreed to waive the forfeiture if he would repurchase. This was done; but the court decided, upon the general usage and the implication of the charter, that the policy had not been legally revived.

The principle of these cases was reaffirmed by the Superior Court of New York City, in *Spitzer v. St. Marks Ins. Co.*, 6 Duer 6 (1856), under a misapprehension, however, as to the final decision of the New York Court of Appeals, in *The Baptist Church v. Brooklyn Fire Ins. Co.*, *infra*.

But judicial opinion was by no means uniform on this subject. In *Smith v. Odlin*, 4 Yeates 468 (1807), Chief Justice TILGHMAN refused, *obiter*, to pronounce an oral contract of insurance invalid. In *Sandford v. Trust Fire Ins. Co.*, 11 Paige 547 (1845), Chancellor WALWORTH admitted the possibility of an oral insurance. In *McCulloch v. The Eagle Ins. Co.*, 1 Pick. 278 (1822), Chief Justice PARKER said it was "certain that, if a contract was made, the mere want of a policy will not prevent plaintiff from recovering." But in this and in the foregoing case, there was no completed contract.

Finally, in *Warren v. Ocean Ins. Co.*, 16 Me. 439 (1840), a waiver of forfeiture, irregularly endorsed by the

company's agent upon the policy, was declared binding as a parol agreement, though the usual fee had not been paid. Since then the validity of a parol insurance has been so frequently and uniformly affirmed, that it may well be pronounced the undoubted American doctrine.

The ground taken is, that at common law, a contract of insurance was not different from any other. No contract is required to be in writing unless by statute. When the agreement to insure has been made by a company, it is governed by the same rules which prevail in a transaction with an individual underwriter. By prescribing a manner of executing the policy, the charter does not exclude the oral engagement, because the contract and the policy of insurance are not identical. The leading case for this view is *The Com. Mutual Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318 (1856). That was an oral contract with a company organized on the mutual plan. No premium was paid, no premium-note was given, and the loss occurred before the policy could be executed. CURTIS, J., held that the liability to give a premium-note was equivalent to the actual execution and delivery of it, and that the oral contract bound the company. In the following cases parol contracts were held obligatory, notwithstanding the implication of a charter provision that policies should be binding only when signed by the president and secretary, and countersigned by the agent. In many of these cases it was admitted that a corporation could disaffirm its most solemn acts if *ultra vires*. In some instances the premium was paid, in whole or in part, by note or in cash: *Ide v. Phoenix Ins. Co.*, 2 Biss. 333; *Hamilton v. Lycoming Mutual Ins. Co.*, 5 Barr 339; *Mobile, &c., Ins. Co. v. McMillan*, 31 Ala. 711; *Blanchard v. Waite*, 28 Me. 51; *Lightbody v. N. A. Ins. Co.*, 23 Wend. 18; *Hartford Ins. Co. v. Farrish*, 73 Ill. 166; *Shaw v. Rep. Life Ins. Co.*, 67 Barb. 586;

Home Ins. Co. v. Myer, 93 Ill. 271.

In other cases no premium was paid: *New Eng., &c., Ins. Co. v. Robinson*, 25 Ind. 536; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 435; *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. 82; *West. Mass. Ins. Co. v. Duffey*, 2 Kans. 347; *Rhodes v. Railway Pass. Ins. Co.*, 5 Lans. 71; *Weeks v. Lycoming Ins. Co.*, 7 Ins. L. J. 552; *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441.

The same principle is recognised in cases of life insurance: *Cooper v. Pacific Mutual Life Ins. Co.*, 7 Nev. 116; *Sheldon v. Conn. Mutual Life Ins. Co.*, 25 Conn. 207.

The parol contract is effectual, not only as an original insurance, but also as a renewal of the policy: *Post v. Aetna Ins. Co.*, 43 Barb. 351; and again, as an extension of the policy to cover other goods: *Kennebec Co. v. Augusta Ins. & Banking Co.*, 6 Gray 204. It is just as effectual to establish a retrospective insurance as a written policy: *Security Fire Ins. Co. v. Kentucky M. & F. Ins. Co.*, 7 Bush 81. So too a special privilege, as permission to ship goods on deck instead of in the vessel's hold, may be granted by parol, though such permission is required by the terms of the policy to be endorsed thereon: *N. W. Iron Co. v. Aetna Ins. Co.*, 26 Wis. 78.

Notwithstanding the very explicit opinion of CURTIS, J., in *Com. Mutual Ins. Co. v. Union Mutual Ins. Co.*, *supra*, later cases have apparently established an exception in this regard, when the alleged contract was with a mutual company. It seems necessary for the insured to pay the premium, deliver the premium note, and receive or sign the policy, before the contract is complete. This is so, because it is said, mutual companies could not otherwise do busi-

ness. The premium notes are their sole capital, and the claim against the insured, to have him execute a note, is too dangerous and tedious a remedy. The requirements which they make of their members are conditions precedent to any insurance: *Belleville Mutual Ins. Co. v. Van Winkle*, 1 Beas. 333; *Schaffer v. Mutual Fire Ins. Co.*, 89 Penn. St. 296.

In the leading case of *The Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305 (1859), suit was brought upon an oral contract to renew from year to year, in consideration of the annual premium. Prepayment of premium was waived in same way, and loss occurred after expiration of year, and before payment of premium. One of the defences was that the agreement, because not in writing, was void by the Statute of Frauds, as by its terms not to be performed within a year from the making. The court held, that since performance was not impossible within a year, the statute did not apply. To the same effect is *Sanborn v. Fireman's Ins. Co.*, 16 Gray 448.

Where a statute requires written contracts of insurance to have a stamp, without anything further, an oral contract is not for that reason invalid: *Fish v. Cottenet*, 44 N. Y. 538.

A statute requiring all the conditions of the insurance to be inserted in the policy, simply prevents other papers being made a part of the policy by mere reference, and does not forbid a parol insurance: *Relief Fire Ins. Co. v. Shaw*, 4 Otto 574.

A policy is not invalid on the ground of no insurable interest in a case of loss before issuance; because the interest did exist at the time of the parol contract, and the insurance dates from that time: *City of Davenport v. Peoria, &c., Ins. Co.*, 17 Iowa 276; *Am. Horse Ins. Co. v. Patterson*, 28 Ind. 17.

Although an agent is instructed in all cases to make out policies which by their

terms are not to be obligatory until countersigned by himself, yet he may bind the company by a preliminary parol contract; and the circumstance that he has in his possession policies executed in blank by the company, is conclusive evidence that they designed him to exercise this incidental authority: *Ellis v. Albany, &c., Ins. Co.*, 50 N. Y. 402; *Post v. Aetna Ins. Co.*, 43 Barb. 351; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171. His authority may also be settled by custom: *Com. Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318.

Of course all the elements of a perfect contract must be present; unless everything essential is ascertained, there is no insurance: *Sandford v. Trust, &c., Ins. Co.*, 11 Paige Ch. 547; *Hartford Ins. Co. v. Wilcox*, 57 Ill. 180.

It was said by Judge ROBERTSON, in *Tyler v. N. A. Ins. Co.*, 4 Robt. 151, that there were five essential elements in every contract of insurance, all of which must be definitely ascertained to make a valid obligation, viz., the subject-matter, the risk, the amount, the duration, and the premium. But the cases hardly justify so rigid a proposition. Frequently one of these elements, when not settled by the express contract, is supplied by implication. *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216, was a case of this sort. The company had at divers times insured A. upon certain papers and plates, portions of a work he was publishing, while at the binders. On sending a fresh lot to the binders, A. applied for a policy, stating risk, amount and time. A policy was promised, but no premium was settled. The court held that, since the risk did not differ in character or duration from the preceding arrangements, the same premium was to be implied. *Eames v. Home Ins. Co.*, 4 Otto 621, was a parol contract in which the duration of the risk was not fixed, and the court assumed that it was intended to endure for one year, accord-

ing to general custom. Again, where the amount of the premium was not fixed, but by agreement was to be deducted, when settled, from moneys due insured in the hands of the company, it was held that the designation of a fund was sufficient: *Walker v. Met. Ins. Co.*, 56 Me. 371. In a case where the fixing of the premium was postponed till the agent could inspect the building, the verbal contract was nevertheless held complete, and the company was liable for loss before inspection: *Cooke v. Aetna Ins. Co.*, 7 Daly 555. When authority is given to an agent to take out a policy in some good company, the premium which the agent in his discretion may settle will bind the applicant: *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598. And conversely where the agent represents several companies, and it is left to his discretion where to place the risk, the exercise of this discretion by entry on his books binds the company named there, before the issuance of a policy: *Ellis v. Albany, &c., Ins. Co.*, 50 N. Y. 402. When the negotiation is carried on by mail, the contract is complete from the time the insured posts a letter accepting the insurer's proposition; and a check sent at that time is a prepayment of premium: *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, overruling *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278.

Merely handing in an application subject to the approval of the company, is not equivalent to an agreement to insure. The company, where it has not unreasonably delayed its decision, may reject the application after loss. And it is not bound to return the premium at the same time, unless demand is made: *Harp v. Grangers, &c., Ins. Co.*, 49 Md. 307; *Alabama, &c., Ins. Co. v. Mayes*, 61 Ala. 163; *Barr v. N. A. Ins. Co.*, 61 Ind. 488. And the applicant may withdraw his proposal any time before acceptance: *Globe, &c., Ins. Co. v. Snell*, 19 Hun 560. But where the agent

takes the premium and declares the applicant insured upon the oral contract, but no policy is to issue till the company's special agent has inspected the building, the company has by this arrangement merely the right to terminate the contract, if upon inspection its agent disapproves the risk. In the meantime, the applicant is insured: *Putnam v. Home Ins. Co.*, 123 Mass. 324.

Where the policy is made out, but is not accepted and premium paid within a reasonable time, the company may consider the contract at an end: *Baxter v. Massasoit Ins. Co.*, 13 Allen 320.

Where the company has a rule of which the applicant has notice, that no insurance is complete until a written acceptance of the terms is filed with the company, or until premium has been paid, there is no contract till this is done: *Flint v. Ohio Ins. Co.*, 8 Ohio 501; *Markey v. The Ins. Co.*, 126 Mass. 158.

But where the agent of the company agrees to issue a policy, and tells the applicant that he may consider himself insured, the contract is complete without prepayment of premium, although the policy when issued will contain a provision that it shall not be binding until premium is paid: *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. 82.

It has sometimes been said that there is a distinction between contracts of insurance and contracts to insure. The parol agreement is the contract to insure; and the executed policy is the contract of insurance. The distinction, however, is almost without theoretical or practical value. The elements of the contract, the rights and liabilities of the parties, are substantially the same in both instances. The oral agreement is just as much a contract of insurance as a written policy. Apparently the real *ratio decidendi*, in all the cases where this distinction has been alluded to, is that, although the charter of a company or a statute may prescribe a way in which policies are to be executed, this does not ne-

cessarily exclude oral agreements: *Commercial Ins. Co. v. Union, &c., Ins. Co.*, 19 How. 318; *Ins. Co. v. Colt*, 20 Wall. 560.

Consequently, in those states and countries, for example, Georgia, England and some of the continental countries, where by statute contracts of insurance must be in writing, neither party is bound by a verbal agreement; no recovery can be had against the company in case of loss; and the applicant may withdraw his proposal any time before receiving his policy: *Simonton v. Liverpool Ins. Co.*, 51 Ga. 76; *Croghan v. N. Y. Underwriters' Agency*, 53 Id. 109; *Clark v. Brand*, 62 Id. 23; *Xenos v. Wickham*, Law Rep., 2 H. L. 296, 314; *Warwick v. Slade*, 3 Camp. 127; *Purry v. The Great Ship Co.*, 4 B. & S. 556.

Where the policy is executed but not delivered, the contract of insurance is complete. Upon loss trover may be brought for the policy, and the full indemnity recovered: *Kohne v. Ins. Co. of North America*, 1 Wash. C. C. 93.

If the policy has not been executed, the insured has his election; he may proceed at law upon the parol contract, or he may bring a bill in equity for specific performance of the agreement to issue a policy. And the latter seems the better method; since equity, to prevent circuity of action, having jurisdiction of the case will determine the whole matter, and make a decree for the payment of the actual loss: *Walker v. Met. Ins. Co.*, 56 N.c. 371; *Commercial, &c., Ins. Co. v. Union, &c., Ins. Co.*, 19 How. 318; *Woody v. Old Dominion Ins. Co.*, 31 Grattan 362; *N. W. Iron Co. v. Aetna Ins. Co.*, 26 Wis. 78; *Security Fire Ins. Co. v. Kenty, &c., Ins. Co.*, 7 Bush 81.

Where the ground of claim is an oral renewal, an action will lie on the policy: *Post v. Aetna Ins. Co.*, 43 Barb. 351.

Where the policy should, by its terms, be executed by the president and secre-

tary, and in fact is not, but is countersigned by the agent, suit should be brought on the parol agreement and not on the policy: *Peoria Ins. Co. v. Walser*, 22 Ind. 73.

By the law of Canada, the insured cannot sue at law directly for the amount of the loss upon a parol contract; his only remedy is in equity, or, perhaps, an action at law for the delivery of the policy: *Jones v. Prov. Ins. Co.*, 16 Up. Can. Q. B. 477.

If the policy when issued does not conform to the verbal agreement, there is no merger, unless under circumstances which amount to an acceptance of the policy with notice of the variance:

Humphrey v. Hartford Fire Ins. Co., 15 Blatchf. 504; *Franklin Ins. Co. v. Hewitt*, 3 B. Mon. 231. And where the variance has occurred through the error of the company, equity will rectify the mistake and award full damages for the loss: *Home Ins. Co. v. Myer*, 93 Ill. 271. A court of admiralty, however, will not reform a policy of insurance. That court has no jurisdiction of the preliminary contract, out only of the perfect instrument; just as it has no jurisdiction over the contract to build a ship, though it has over the ship when built: *Andrews v. Essex Fire & Marine Ins. Co.*, 3 Mason 6.

DWIGHT M. LOWREY.

Supreme Court of California.

PRATT v. WHITTIER, ET AL.

As between the vendor and vendee, the rule for determining what is a fixture is always construed strongly against the vendor.

Chattels attached to the freehold by the owner, and contributing to its value and enjoyment, pass by a grant of the freehold if the grantor has power to convey.

Parties may by express agreement fix upon chattels annexed to the realty whatever character they choose. Property which the law regards as fixtures may be by them considered as personality, and *vice versa*; and such agreements will be enforced by the courts.

Plaintiff by deed granted to defendant the Orleans Hotel, describing it as "Lot No. 6, in the square between J and K and Front and Second streets, in the city of Sacramento, and the appurtenances and improvements thereunto belonging." Plaintiff reserved in his deed the right to remove from the upper rooms of the hotel his "furniture, carpets and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed." Held, that the plaintiff was not entitled to remove the gas fixtures, consisting of chandeliers; globes lettered "Orleans Hotel;" brackets, burners, pendants, &c.; a kitchen-range with boilers attached, the range resting on a brick foundation and with its attachments connected to the building by pipes; tanks and filters attached to the building by a system of pipes, nor mosquito-transoms and window-screens fitted to the windows and transoms of the hotel in the usual manner, as such articles were fixtures which passed by the deed to defendant as being essential for the purposes for which the building was formerly used. The plaintiff having reserved in his deed only the furniture, pictures and carpets of the upper rooms of the building, and none of the "permanent fixtures or appurtenances to the property," it must be presumed that the parties by their agreement considered the things in controversy as permanent fixtures and appurtenances of the hotel which were to pass by the deed.

McFarland & Edgerton, for appellant.

Freeman & Bates, for respondents.

McKEE, J.—This was an action to recover certain gas fixtures, consisting of chandeliers, globes, brackets, burners, pendants, &c., a kitchen-range with boiler attached, a patent water-filter, tanks and mosquito-screens. The property was attached to a building known as the "Orleans Hotel," situate on a lot of land fronting on Second street, in the city of Sacramento.

As owner of the hotel, the plaintiff on October 15th 1879, contracted in writing to sell the same to the defendant, by the following description, viz. :

"Lot No. 6 in the square between J and K and Front and Second streets, in the city of Sacramento, and the appurtenances and improvements thereunto belonging." The sale was made for \$28,000 gold coin, payable after an examination and approval of the title, upon receiving from the plaintiff possession of the property and of a deed of grant of the same, on or before the first day of November 1879, reserving to the plaintiff, among other things, the right, within ten days after delivery of possession, to remove from the upper rooms of the hotel "his furniture, carpets and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed." On the 26th of October, the defendants, having satisfied themselves about the plaintiff's title, paid the full amount of the purchase-money and received from the plaintiff possession and a deed of grant of the property. The deed described the property the same way that it had been described in the contract of sale, and it also contained the recital that the deed had been made in pursuance of the contract of sale, and subject to the terms, conditions and reservations therein contained.

Within ten days after the delivery of possession plaintiff demanded of the defendants the privilege of removing the articles in controversy from the hotel, which, being refused, this action was instituted, and the question arises whether the articles are personalty, or fixtures which passed as appurtenances of the realty by the deed of grant.

If the question arose out of the deed alone it might not be difficult of solution, for the weight of authority seems to be in favor of the proposition that they are to be regarded as movable property, capable of being severed from the building; yet the

authorities upon the subject are conflicting. In *McKeag v. Hanover Fire Ins. Co.*, 81 N. Y. 38, the Supreme Court of New York held that gas pipes which run through the walls and under the floors of a house are permanent parts of the building; but fixtures attached to such pipes, where they are simply screwed on projections of the pipes from the walls, which can be detached by unscrewing them, are not appurtenances, and so do not pass by deed or under a mortgage of the premises, and the mere declaration of the owner that he intends that such articles shall go with the house does not make them realty.

In *Guthrie v. Jones*, 108 Mass. 193, it was held that, as between landlord and tenant, gas fixtures, though fastened to the walls, were not annexed to the realty so as to become part of it. They are, says the court, in their nature, articles of furniture, and the fact that they were fastened to the walls for safety or convenience does not deprive them of their character as personal chattels and make them a part of the realty.

In *Vaughen v. Haldeman*, 33 Penn. St. 522, the court says: "Lamps, chandeliers, candlesticks, candelabras, screens and the various contrivances for lighting houses by means of candles, oil or other fluids, have never been considered as fixtures and as forming a part of the freehold. There is no trace of a contrary doctrine in the English decisions, nor does it appear that the ordinary apparatus for lighting has ever been classed among fixtures. In *Jarechi v. Philharmonic Society*, 79 Penn. St. 403, and 21 Am. Rep. 78, the case of *Vaughen v. Haldeman* was reviewed and approved. Says SHARSWOOD, J.—"Houses are considered as finished by the builders when the gas fittings are completed. The fixtures are put up in more or less expensive style, according to the tastes and means of the persons who mean to occupy them, whether as tenants or owners. If the tenant puts them in, it is not denied that, as between him and the landlord, they are his, and he may remove them or they may be sold as personal property on an execution by the sheriff. No doubt the owner, if they belong to him, often sells them with the house. They add more to the value of the house than they would be worth if removed. But if there is no agreement to sell the house as it is—fixtures and all—the purchaser is not entitled to them. We see then no reason for departing from the judgment in *Vaughen v. Haldeman*." To the same effect are *Shaw v. Lenke*, 1 Daly 487;

Montague v. Dent, 10 Rich. 138; *Rogers v. Crow*, 40 Mo. 91; *Lawrence v. Kemp*, 1 Duer 363; *Towne v. Fiske*, 127 Mass. 125.

On the other hand, it has been held by the Supreme Court of Kentucky, in the case of *Johnson v. Wiseman*, 4 Met. 357, that where a vendee of a house in possession purchased and put into it gas fixtures, chandeliers, &c., which were affixed by means of screws to iron pipes let into the walls of the house for the purpose of conducting gas to the burners, such chandeliers, &c., became fixtures which passed by a deed of the realty, in the absence of any express provision to the contrary, although they may be removable without injury to the walls or the ceiling of the house, or to the pipes to which they are attached. The same doctrine was enunciated in *Smith v. Commonwealth*, 14 Bush 31, as one about which there was no question. Whatever, indeed, is accessory to a building for the more convenient use and improvement of the building is considered to pass by a deed of the premises. Thus articles placed in a mill by the owner to carry out the obvious purpose for which it was erected are generally part of the realty, notwithstanding the fact that they could be removed and used elsewhere: *Parsons v. Copeland*, 38 Me. 537. In a building erected as a factory, the steam works relied on to furnish the motive power, and the works to be driven by it, are essential parts of the factory, adapted to be used with it, and would pass by a conveyance of the real estate: 4 Met. 306. Apparatus for the manufacture of gas are fixtures: *Hays v. Doane*, 3 Stock. 84. Gas burners are of the same character. They are in no sense furniture, but are mere accessories to the building: *Keeler v. Keeler*, 31 N. J. Eq. 191.

What is accessory to real estate is, according to the rule of the common law, part of it, and passes with it by alienation. That rule has been, in the growth of the law, greatly modified as between landlord and tenant, for the encouragement of trade, manufacture, agriculture and domestic convenience; and courts recognise and enforce the right of removal by a tenant of chattels annexed to the freehold for such purposes. But the rule which is applicable to persons in that relation, does not apply as between heir and executor, vendor and vendee. As between the latter the rule of the common law is still applicable, except so far as it may be modified by statutory regulations upon the subject. So that chattels attached to the freehold by the owner, and contributing to

its value and enjoyment, pass by the grant of the freehold, if the grantor had power to convey, *Tourtellot v. Phelps*, 4 Gray 378, and after conveyance they cannot be severed by the vendor or any one else than the owner.

As between vendor and vendee, therefore, the rule for determining what is a fixture is always construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed; and they will be regarded as fixtures, which pass to the vendee, although annexed and used for purposes of trade, manufacture, or for ornament or domestic use. Thus, potash kettles appertaining to a building for manufacturing ashes (*Miller v. Plumb*, 6 Cowen 665); a cotton-gin fixed in its place (*Bratton v. Clawson*, 2 Strob. 478); a steam engine to drive a bark mill (*Oves v. Oglesby*, 7 Watts 106); kettles set in brick, in dyeing and print works (*Despatch Line of Packets v. Bellamy Man. Co.*, 12 N. H. 207); iron stoves fixed to the brick work of chimneys (*Goddard v. Chase*, 7 Mass. 432); wainscot work, fixed and dormant tables, engines and boilers used in a flour mill and attached to it (*Sands v. Pfeiffer*, 10 Cal. 259); a steam-engine and boiler fastened to a frame of timber, and bedded in a quartz ledge, and used for the purpose of working the ledge (*Merritt v. Judd*, 14 Cal. 59); a conduit of water-pipe to conduct water to a house (*Philbrick v. Emry*, 97 Mass. 134); hop-poles in use on a hop-farm (*Bishop v. Bishop*, 11 N. Y. 123); statues erected for ornament, though only kept in place by their own weight (*Snedeker v. Warring*, 2 Kern. 170). In fact, whatever the vendor has annexed to a building, for the more convenient use and improvement of the premises passes by his deed. The true rule deduced from all the authorities, say the Supreme Court of Virginia, seems to be this: That when the machinery is permanent in its character, and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential for the purposes for which the building is used will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either: *Green v. Phillips*, 26 Gratt. 752; *Shelton v. Ficklin*, 32 Id. 735.

Judged by these rules, it would seem as if there was no room for doubt as to the character of the articles in controversy. Taking into consideration their nature, the circumstances under which they

were placed in the building, the mode of their connection with it, and the relation which they bear to its use and enjoyment, they must be regarded as essential for the purposes for which the building was used. The plaintiff himself, by his testimony, shows that the globes were lettered "Orleans Hotel," and that they, with the chandeliers, &c, were necessary for furnishing light to the building; that the range rested on a foundation of brick, and that it and its attachments were annexed to the building by pipes, which connected them with the tanks and filters on the roof of the building, and by a waste-pipe which ran through the wall of the building and connected with a sewer in an alley outside, and that the range and its attachments were necessary for cooking; that the tanks and filters were attached to the building by a system of pipes which connected them with the main or pipes of the City Water Company, and with various parts of the hotel, and were necessary to supply the hotel with clear water; that the mosquito-transoms and window-screens were fitted to the windows and transoms of the hotel—each window and transom-frame being fitted to its particular window, and shoved up and down in it on grooves, and all of them were as necessary to the hotel as its windows, its blinds and shutters. All of the articles were therefore essential to the use and enjoyment of the hotel; in fact, as the plaintiff testified, "it would not have been a hotel without them." They were, therefore, fixtures which passed by the deed of grant to the defendant, unless they were specially reserved by the deed. But the deed reserved none of the articles. It was made, according to its recitals, in pursuance of the agreement of the 15th of October, and subject to the terms, conditions and reservations therein contained and expressed.

As already stated, the agreement reserved only the furniture, pictures and carpets of the upper rooms of the building, and none of the "permanent fixtures or appurtenances to the property." In the absence from the deed of any special reservation of the articles, it must be presumed that the parties, by their agreement, considered them as permanent fixtures and appurtenances of the hotel which were to pass by the deed. It is a well-settled rule of law that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture. Whatever may be their

agreement, courts will enforce it: *Smith v. Waggoner*, 50 Wis. 155· 97 Mass. 279; 20 N. Y. 344; 53 Id. 377; 24 Wend. 359; 1 Hill 176; 52 N. Y. 146.

So that the plaintiff, when he contracted to sell the hotel property with its appurtenances and improvements, reserving from the sale only the carpets, furniture and pictures of the upper rooms of the building, fixed upon all the chattels which he had annexed to the hotel, and which were necessary to its use and enjoyment, the character of appurtenances and improvements of the hotel. None of them, by any possibility of construction, could fall within the reservation of "furniture, carpets or pictures in the upper rooms of the hotel."

The plaintiff, therefore, sold the articles in question as fixtures with the hotel, and as such they passed by his subsequent deed of the premises to the defendants.

Judgment and order affirmed.

As between landlord and tenant gas fixtures, so called, consisting of gas chandeliers, burners, &c., screwed upon the gas pipe in the usual way, have always been considered as the property of the tenant and removable by him. See *Lawrence v. Kemp*, 1 Duer 363; *Ex parte Morrow*, 1 Lowell's Dec. 386; s. o., 2 N. B. R. (2d ed.) 665; *Guthrie v. Jones*, 108 Mass. 191; *Secger v. Pettit*, 77 Penn. St. 437; *Hays v. Doane*, 11 N. J. Eq. 84.

As between vendor and vendee, and mortgagor and mortgagee, the weight of authority in the United States seems to be, as stated in the principal case, that where the question is not affected by the terms of the contract between the parties, they are regarded as furniture and do not pass with the land; *Montague v. Dent*, 10 Rich. Law 135, where it was so held as between the purchaser at a mortgage sale and an execution creditor. *Vaughen v. Haldeman*, 33 Penn. St. 322; *Jurechi v. Philharmonic Society*, 79 Penn. St. 403; *Rogers v. Crow*, 40 Mo. 91; *Shaw v. Lenke*, 1 Daly 487; *McKeage v. Hanover F. Ins. Co.*, 81 N. Y. 38; *Towne v. Fiske*, 127

Mass. 125; see, also, *Lawrence v. Kemp*, 1 Duer 363; *Stear v. Douglas*, 1870, Brown's Fixt., Appendix A.; *Funk v. Brigaldi*, 4 Daly 359. See, however, *contra*, *Johnson v. Wiseman*, 4 Met. (Ky.) 357; *Sewell v. Angerstein*, 18 L. T. (N. S.) 300, at Nisi Prius per WILLES, J., the judges of the Court of C. P. agreeing with him; *Ex parte Acton*, 4 L. T. (N. S.) 261; *Ex parte Wilson*, 2 Mont. & Ayr, 71; *Smith v. Commonwealth*, 14 Bush 31; see, also, *Ex parte Morrow*, 1 Low. Dec. 386; s. o. 2 N. B. R. (2d ed.) 665. In *Ex parte Acton*, and *Ex parte Wilson*, *supra*, the gas burners were accessory to a mill and the cases may probably be distinguished on that account.

Gas fittings (*i. e.* the pipes to which the gas fixtures are attached) as distinguished from gas fixtures, do, however, pass with the land where there is nothing in the deed to indicate a contrary intention. *Ackroyd v. Mitchell*, 3 L. T. (N. S.) 236; *Ex parte Acton*, 4 L. T. (N. S.) 261; *Ex parte Wilson*, 2 Mont. & Ayr 61; *McKeage v. Hanover F. Ins. Co.* 81 N. Y. 38. So, also, as it seems, as to gasometers and apparatus

for generating gas; *Hays v. Doane*, 11 N. J. Eq. 96.

Gas fixtures may also pass with the land, where it is apparent from the deed that such was the intention of the parties, and this appears to be the real ground of the decision in the principal case; and upon this ground the decision seems correct.

The kitchen range and boilers, and the tanks and filters, would seem clearly to come within the same rule applied to the gas fixtures. Stoves set up in the usual way are, however, in the absence of terms in the deed affecting the question, generally considered as furniture, and hence do not pass with the land; *Williams v. Bailey*, Sup. Ct. Mass., Essex, April 1801, 3 Dane's Abr. 152, sect. 25; *Freeland v. Southworth*, 24 Wend. 191; *Harris v. Haynes*, 34 Vt. 220; see, also, *Tuttle v. Robinson*, 33 N. H. 104. See, however, *v. Chuse*, 7 Mass. 432; *Smith v. Heiskell*, 1 Cranch C. C. 99; *Blethen v. Towle*, 19 Me. 252. See, also, *Folsom v. Moore*, Id. 252; *Tuttle v. Robinson*, *supra*. In the above cases, the stoves held to pass with the land were probably more or less securely annexed to the house.

As to hot-air furnaces, there is some conflict among the authorities. In *Towne v. Fiske*, 127 Mass. 125, a portable hot-air furnace, resting by its own weight upon the ground, put into a house by a person rightfully in possession under an agreement for a deed (in which case the same rule prevails, as between grantor and grantee: *McLaughlin v. Nash*, 14 Allen 136; *Hemenway v. Cutter*, 51 Me. 407; *Ogden v. Stock*, 34 Ill. 522; *Christian v. Dripps*, 28 Penn. St. 271; *Perkins v. Swanke*, 43 Miss. 349; *Ewell on Fixt.* 272), was held not to become a part of the realty, although connected with the house by a cold-air box, and hot-air pipes and registers in the usual manner.

On the other hand in *Stockwell v. Campbell*, 39 Conn. 362, a portable hot-

air furnace, placed by the owner of the freehold in a pit prepared for it in the cellar of the house, but not set in brick or otherwise fastened to the house or floor, but held in its place by its own weight, together with the smoke-pipe leading therefrom to the chimney, all capable of removal without injury to themselves or the house, but intended as a permanent annexation, as appeared from the pit in the cellar, adapted to its size and depth, were held to be a part of the realty, rendering the whole house subject to a mechanic's lien, for the value thereof and the labor of setting them in the house. In *Main v. Schwarzwald*, 4 E. D. Smith 273, the hot-air furnace which was held to pass with the house, was so connected with the house by the owner, that to remove it, it would be necessary to take down brick-work adjoining it, and its removal would probably cause the ceiling to fall. Where the connection between a furnace put into a house by the owner of the house, is so intimate as in this case, or, as in *Stockwell v. Campbell*, it is so annexed as to appear to have been intended as a permanent annexation to the house, the better opinion would seem to be that it should be regarded as passing with the house, and not as furniture or mere personal property. In point of fact, such furnaces are believed to be generally considered as permanent accessions to the houses containing them, and not to be subject to removal as are ordinary stoves; and hence the case of *Towne v. Fiske* would seem open to criticism upon this point.

As to the screen windows and transoms there would seem to be no doubt as to the correctness of the decision in the principal case; and those articles would doubtless have been considered as fixtures passing with the house in the absence of words in the deed affecting the question. Having been made for, fitted to, and used with the house, they would seem to be as much a part of the house

as ordinary doors or windows. See *Pettengill v. Evans*, 5 N. H. 54; *Wistow's Case*, 14 H. 8 25, pl. 6; *Liford's Case*, 14 Vin. Abr. 3193; 11 Co. 85; Shep. Touch. 90; *State v. Elliot*, 11 N. H. 540; *Johnston v. Dobie*, Mor. Dict. 5443. Where, however, double windows or blinds have never been actually or constructively annexed to the house, which

is complete without them, they will not pass by the conveyance of the house, though they may be secreted in the house: *Peck v. Batchelder*, 40 Vt. 233.

On the whole the decision in the principal case seems satisfactory, and in accordance with established principles.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Tennessee.

W. H. CHERRY v. JOHN P. FROST ET AL.

An assignment for value, in due course of trade, of a certificate in a corporation with a blank power of attorney to transfer the stock in the books of the company passes the whole title legal and equitable.

If the pledgee of a certificate of stock so assigned as collateral security, sub-pledges the certificate for money loaned to him in ignorance of the owner's equity, the sub-pledgee will be entitled to hold the stock, as against the owner, to the extent of the consideration. Where a note is given for money borrowed at the time, secured by stock pledged as collateral, and the note is renewed at maturity, upon an extension of time, and the new note secured by a pledge of the same, or other stocks assigned with power of attorney to transfer, the payee who receives them without notice of any outstanding equity, takes them in due course of trade free from such equity.

If the holders of a note, secured by stock as collaterals, after the contract has been closed, exchange any of the collaterals with the makers of the notes for other stocks of equal value, he would take the latter as security for a pre-existing debt, but would be a purchaser of them to the extent of the consideration given in exchange.

At the time a certificate of stock was wrongfully sub-pledged, only a part of the stock was paid up, the corporation then holding the note of the stockholder for the residue payable on call, and the stockholders afterwards made a payment on the stock, and gave a negotiable note on the residue, *Held*, that the sub-pledgee could only claim, as against the owner, the proportion of the stock paid up at the time he received the certificate.

In November 1871, the complainant Cherry borrowed from the City Bank of Memphis \$1000, for which he gave his note, due on demand, and at the same time deposited with the bank, as collateral security, a certificate of forty shares, of \$100 each, of the capital stock of the Mississippi Valley Insurance Company. The certificate was, by its face, "transferable in person or by attorney on surrender of this certificate." On the back of the certificate was an assignment for value and the printed form of a power of attor-

ney to make the transfer on the books of the company, left blank as to the name of the attorney and signed by complainant.

In June 1872, complainant executed to the City Bank of Memphis his note, at ninety days, for \$1000, another sum of money that day borrowed by him, and to secure its payment delivered to the bank, as collateral security, with a similar endorsement and blank power of attorney as above, a certificate of thirty shares, of \$100 each, in the capital stock of the Merchants' National Bank. The certificate was in the form of the certificate as above.

In July 1872, the City Bank suspended payments, and proved to be utterly insolvent. Upon inquiry the complainant learned that the certificates of stock, deposited as collateral security for the payment of his notes, were claimed by defendant Frost, as having been pledged to him to secure money borrowed from him by the City Bank. Complainant offered to pay the amount of his two notes upon surrender of his certificates, which offer was refused by the defendant Frost. Complainant, then, on the 1st of August 1872, notified the Mississippi Valley Insurance Company and the Merchants' National Bank not to assign the stock on their books, no assignment having yet been made under the power, and on the 9th of August 1872, he commenced this suit to enjoin the transferee and to assert his rights.

The answer of Frost was that, in May 1872, he loaned to the City Bank \$12,000, for which the bank executed to him two notes of that date, one for \$4000, at sixty days, and the other for \$8000, at ninety days, and at the same time delivered to him various collaterals, and among others the two certificates deposited by the complainant with the City Bank to secure his notes as above; that defendant received these collaterals under these circumstances, without any notice of the complainant's equity, and under the full belief that they were the property of the bank; that the collaterals received from the bank were insufficient to pay the debt of the bank to him.

On final hearing the chancellor dismissed the bill, whereupon complainant appealed

The opinion of the court was delivered by

COOPER, J.—The complainant insists that the defendant is not a *bona fide* purchaser for value and without notice. He bases his contention first, on the character of the transaction between the

defendant and the bank, and secondly, upon the character of the certificate. It does satisfactorily appear that no money was actually loaned by the defendant to the bank on the 10th of May 1872. About \$3000 of the consideration of the notes of the bank executed on this day had been loaned by the defendant to the bank May 17th 1871. On January 10th 1872 a new note was given by the bank for the amount at four months. On the same day the bank borrowed from Frost the additional sum of \$5000, giving its note therefor, at four months. On 20th of February 1872, the bank borrowed from Frost the additional sum of \$4000, and gave its note therefor. On the 10th of May 1872, these notes were renewed by the two notes for \$8000 and \$4000, for the security of which the defendants claim that the collaterals in controversy were given.

It is first insisted by the complainant, upon this state of facts, that even if it be conceded that certificates of stock are of that character of security which pass to a *bona fide* purchaser for value, free from the equities of third persons, the defendants only received these certificates as security for a pre-existing debt, and not for a consideration passing at the time. The defendant undertakes to meet this argument by saying in his answer and deposition that each of these transactions was a new one, the previous note paid and the new note or notes therefore existing for the new consideration passing. The deposition of the president of the bank, with whom the transaction was made, is not taken, and perhaps in the absence of any positive testimony to the contrary, the defendant's testimony must be allowed to prevail. The substance of what was done, however, whether the form of passing and repassing checks was actually adopted or not, was a new transaction. A note taken up by a note given to renew it is, in general, extinguished: *Hill v. Bostick*, 10 Yerg. 410. A person who gives his money, goods or credit for a note at the time of receiving it, or who then, on account of it, sustained loss or incurred liability, is a holder in the due course of commercial transactions: *Kinbro v. Lytle*, 10 Yerg. 417. And the fact that a security has been transferred, under such circumstances, in fraud of a third person, will not affect the holder's right, if entitled to the character of a *bona fide* holder in due course of trade: *Nichol v. Bate*, 10 Yerg. 429. The defendant, at each renewal by the bank of its notes, parted with the previous note, which was extin-

guished, and received the new note upon the extension of the time of payment with the same or other collaterals. It is not like the receipt of collaterals upon an old note which continues to exist, and is not based on the consideration of the collaterals. In the one case the collaterals may be surrendered to the rightful owner, leaving the debt and the consideration of the debt unaffected. In the other case, the collaterals cannot be taken without depriving the creditor of a part of the consideration of his contract. It is to the former class of cases that the rule invoked by the complainant applies, not to the latter: *Craighead v. Wells*, 8 Baxt. 38.

It is next insisted in this connection that the certificate of stock in the Merchants' Bank was not received by the defendant on the 10th of May 1872, because this certificate was not deposited by the complainant with the bank until the 19th of June 1872, when he executed his second note for \$1000.

The weight of testimony is in favor of the complainant on this contention. The complainant swears positively to the fact that he did give the certificate at that time as collateral security for the note then executed. The defendant, while certain of the receipt of the other certificate on the 10th of May 1872, and probably before that time, is not sure as to the other.

He concedes, moreover, that he was in the habit of sometimes exchanging with the bank securities received by him as collaterals for securities of equal value.

There is very little doubt that the certificate in question was thus received, and not on the 10th of May 1872, when the notes of the bank were executed. The certificate, in that view, would be received as security for a pre-existing debt, but for a consideration then passing, namely, the surrender of other securities of equal value. The party would be a purchaser to the extent of this consideration. The question would, therefore, be whether the person who buys from another a certificate of stock, transferred with a blank power of attorney, is entitled to hold that stock as against the true owner. This leads us to the second branch of the case—the character of a certificate so endorsed and the right of a *bona fide* purchaser for value.

Stock in a corporation, in the sense of the interest of the stockholders, is a species of incorporeal personal property in the nature of a chose in action. A certificate of stock is only written evi-

dence of the ownership of the shares of stock named therein, and is not negotiable. Although, by the by-laws of a corporation, shares of the stock may only be transferable upon the books of the company, an equitable right in them may be acquired by a delivery of the certificate, or by a written assignment or contract, which will be good between the parties, and may be perfected as against the corporation and third parties by notice of the assignment or contract. The effect of a delivery of the certificate with an assignment and a blank power of attorney on the back thereof has been a mooted point. It came before this court in *Cornick v. Richards*, 3 Lea 1, where the contest was between the holder of a certificate so assigned as collateral security and other creditors of the assignor. Two of the judges, MCFARLAND and COOPER, were of opinion that a complete legal title to stock could only be acquired by a transfer on the books of the company; that an assignment of a certificate of stock with a blank power of attorney to make the transfer on the books did not give a complete legal title, but only an equity, good between the parties, and which might be made good against the corporation and against the creditors and assignees of the assignor by notice to the corporation. The other three judges held that the assignment of the certificate with a blank power of attorney signed by the assignor, either by way of sale or as collateral security, would pass the title to the assignee as against the creditors of the assignor without any transfer upon the books of the company or notice to the corporation. The decision did not go any further, for it was not demanded by the facts of the case. And Judge FREEMAN, in delivering the opinion of the majority of the court, said: "It is proper to add that, as a matter of course, we do not hold these certificates negotiable, or that any of the incidents of such character goes with them by the assignment, so that the assignee must take, subject to previous equities, as any other assignee standing in the shoes of the assignor."

The case now before us raises the very question suggested in the latter clause of the sentence quoted. A pledgee of stock has clearly no right, either by absolute sale or sub-pledge, to convey any greater interest than he himself has in the stock pledged: *Talty v. Freedmen's Saving & Trust Co.*, 93 U. S. 321. The equity of the pledgor is to redeem his stock by the payment of the debt secured, and that equity would prevail against the equity of any assignee standing in the shoes of the assignor.

The question is therefore squarely raised in this case whether a sub-pledgee of a certificate of stock transferred with a blank power of attorney can occupy a better position than his pledgor. In the view taken by the minority of the court in *Cornick v. Richards*, and still entertained by them, the assignment of the certificate in that form only passed the equitable title, and any subsequent assignee would, under well-settled law, take subject to the prior equity. In the view of the majority of the court, such an assignment passed the legal title, and, logically, the subsequent assignee would also have the legal title, which, coupled with the equity arising from the consideration of the sale or pledge, would prevail over the prior equity.

The weight of authority in those states which have adopted the rule that the assignment of a certificate of stock with a blank power of attorney to transfer passes the whole title, legal and equitable, undoubtedly is that a sub-assignee, by sale or pledge, may acquire a better right than his assignor. The reason is that the owner has passed the legal title with an unlimited power of disposition, and cannot set up an unknown equity against a title acquired thereunder in good faith for a valuable consideration and in due course of trade. It is conceded that the delivery of a chattel or chose to another in pledge is insufficient to preclude the real owner from asserting his own rights in case of an unauthorized disposition of it by the pledgee; but, it is said, "if the owner intrusts to another not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of unconditional power of disposition over it, the case is vastly different:" *McNeil v. Tenth National Bank*, 46 N. Y. 325. The owner is estopped to dispute the title which he has apparently conferred: *Wood v. Smith*, 37 Leg. Int. 315; *Cushman v. Thayer Man. Co.*, 76 N. Y. 365; *Prall v. Tilt*, 28 N. J. Eq. 483. And the owner may always prevent this result by specifying in his transfer that it is made as collateral security. Upon a reconsideration of the question, the majority of the court adopt these conclusions as the necessary result of the principle settled in *Cornick v. Richards*, and consider the suggestion in the opinion in that case, that the assignee must take subject to previous equities, as an inadvertent dictum. The defendant Frost is therefore entitled to hold the stock in controversy for the satisfaction of his debt.

But the proof shows that on the 10th of May 1872, when the

defendant took the Mississippi Valley Insurance Company's certificates of stock, the complainant had paid only forty per cent. of the stock, and the defendant is only a purchaser in due course of trade to the extent of its then value. The subsequent payment on and change of the form of complainant's stock into a negotiable note still unpaid, no matter what may have been the intention with which the change was made, would not increase the defendant's interest.

With this modification, the decree below will be affirmed.

It is proposed to consider some of the questions arising out of the second branch of the above case, namely, the character of a certificate of stock, accompanied by a bill of sale and power, in the hands of a bona fide purchaser for value, the stock remaining untransferred upon the books of the company.

The first point worthy of attention, is the nature of the title of a bona fide purchaser of stock while that stock remains in the vendor's name upon the books of the corporation.

This is a question of great practical moment, when it is remembered that a vast quantity of stock passes from hand to hand daily, without any book transfer—a single illustration will suffice. Soon after the Reading Railroad suspended payments in May 1880, it was suggested in the newspapers, that the charter of the company imposed an individual liability upon all the shareholders for the debts of the corporation. Speculation in the stock was carried on to an enormous extent, but the actual transfers upon the books were few. The vendees pocketed their certificates and powers, and awaited developments.

There is a wide divergence of opinion upon this subject in the different States.

In *Fisher v. Essex Bank*, 5 Gray 381, SHAW, C. J., said: "The clause itself is too clear to admit of doubt, 'shall be transferable only' that is, capable of being transferred, the largest and broadest term to express alienation on one part, and requisition on the other and

the word 'only' carries an implication as strong as negative words could make it, that it is in no other mode. It was not to prescribe one mode, leaving others unaffected, it made that mode exclusive."

Williams v. Mechanics' Bank of New Haven, 5 Blatch. 59, went further, and declared that transferable at the bank means transferable only at the bank.

The Massachusetts rule seems to have been followed in Connecticut: *Dutton v. Connecticut Bank*, 13 Conn. 493; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245; and in Vermont: *Sabin v. Bank of Woodstock*, 21 Verm. 362. In California the rule is based on statutory regulation, and it has been several times decided, that under section 12 of Act of April 22d 1850, no transfer of stock is good against third parties, unless the transfer be made upon the books of the company. *Weston v. Bear River & Auburn Water and Mining Co.*, 5 Cal. 186; *Strout v. Natoma Water and Mining Co.*, 9 Id. 78; *Naglee v. Pacific Wharf Co.*, 20 Id. 529.

There is, however, a very strong current of opinion the other way. In Pennsylvania as early as *United States v. Vaughan*, 3 Binney 394, it was held, that stock assigned bona fide for full value on the certificate, and handed over to the vendee with a power to transfer, conveyed such an interest that the stock was not liable afterwards to attachment as the property of the vendor, although the transfer was not made upon the books of the bank at the time of the attachment.

To the same effect is *Commonwealth v. Watmough*, 6 Wharton 138. These were both cases of sales of stock, where the vendee had neglected to have a book transfer made.

Finner's Appeal, 9 P. F. Smith 398 was the case of a pledge, and the same rule prevailed.

These decisions were all in cases where the contest lay between creditors. In *Union Bank v. Laird*, 2 Wheaton 390, it was laid down that no person could acquire a legal title to stock, except under a regular transfer, according to the rules of the corporation, and if any person takes an equitable assignment it must be subject to the rights of the corporation, under the acts of incorporation, of which he is bound to take notice. To the same effect is *Bank of Commerce's Appeal*, 23 P. F. Smith 59, which was a peculiar case. The members of a building association were entitled to a loan on each share; one member pledged his certificate of stock to the Bank of Commerce, as collateral for a loan, with power of attorney to transfer. He then borrowed from the building association the full amount to which he was entitled, and transferred his stock, the bank still holding the certificate. The stock was not transferred to the bank on the books of the association. The association expired and the assets were distributed among the stockholders, as shown by their books, including the association, without notice from the bank. A contest between the association and the bank was decided in favor of the former, *AGNEW, J.*, remarking that "the assignment of the certificate is only an equitable transfer of the stock, and to be made available must be produced to the corporation, and a transfer demanded—as between adverse claimants of the certificate, the possession of it with the transfer on it, is often the test of the title, but when the corporation itself is not dealing with its stockholders on the security of his stock, and is merely per-

forming a corporate duty, its own record is all it needs to consult, for whoever would demand the privileges of a stockholder, should produce the evidence of his title and ask to be permitted to participate."

The New York law, as laid down in the familiar *New Haven Railroad cases*, 34 N. Y. 30, seems to be, that the purchaser who receives a certificate with power of attorney, gets the entire title legal and equitable, as between himself and the seller, with all the rights the latter possessed, but as between himself and the corporation, he acquires only an equitable title which they are bound to recognise and permit to be ripened into a legal title, when he presents himself (before any effective transfer has been made on the books), to do the acts required by the charter or by-laws, in order to make a transfer. Until those acts are done, he is not a stockholder and has no claim to act as such, but possesses as between himself and the corporation, by virtue of the certificate and power, the right to make himself or whomsoever he chooses, a stockholder by the prescribed transfer.

The contention thereof, that until a book transfer has taken place, the holder of the stock has but an equitable title, is both true and untrue. It is true as against the company itself. If its rules for example prescribe that no transfer shall be allowed if the transferor be indebted to the company, then the title of the transferee, legal as against the rest of the world, is but equitable as against the company. But it is untrue as to all other parties. *New York & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 80; *Bank v. Kortright*, 22 Wendell 348; *Rogers v. Stevens*, 4 Halst. Ch. 167; *Broadway Bank v. McElrath*, 2 Beasley 24; *Hunterdon v. Nassau Bank*, 2 C. E. Green 496; *Railroad Co. v. Thomson*, 40 Geo. 411.

It is thus observed, that the decisions in the different states present a diversity

of opinion, upon the question in hand. But it would seem that those of Pennsylvania, New York, and New Jersey, rest upon a more substantial foundation, and for these reasons: the argument in favor of a book transfer being the only valid one as against third parties, and more especially creditors, has been that the same rule which is requisite to make a transfer of ordinary goods and chattels valid against execution creditors, ought to be observed and applied as far as practicable in the transfer of stock; that to render a transfer of goods valid against the claims of creditors of the vendor, a transmutation of possession must accompany the transfer, but as this is not altogether practicable in the case of stock, on account of its not being susceptible of manual occupation, yet if it will admit of anything being done which can fairly be considered equivalent to an actual change in possession of goods, it ought to be done, otherwise the sale ought to be held invalid, at least as against creditors of the vendor; that a book transfer would seem to be the only thing that could be deemed in such a case an equivalent to the vendee's taking actual possession in the case of goods, and therefore unless done the transfer ought not to avail against creditors.

This was substantially the argument brought forward in *Commonwealth v. Watmough*, *supra*, but it was well met by Mr. Justice KENNEDY, who said that although the legislature had made such stock subject to execution, yet the nature of it has not been thereby changed, so as to have become similar to goods and chattels. For the debts of the *real* owners it is made liable to be taken in execution; but as to what constitutes the ownership in it, or the nature of the evidence by which it may be established, are in no wise changed. Stock is from its very nature incapable of such possession as to make it known or notorious who has the use or benefit of it; even its existence may be known but to comparatively a few persons.

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The only evidence of it that can be safely trusted as to this, is the books of the corporation, but they being of a private nature are not open to public inspection. Hence it is that the ownership, though held by the owner in his own name on the books, "is not supposed to have given him a general credit with the world. The great object of requiring transfers to be made in this manner is to prevent all difficulty that otherwise might arise with the authorities of the corporation, to know who its corporators are, who are entitled to vote at elections, receive dividends," &c.

But a second and by far the most important question remains to be considered, viz., the position of the subpledgee in the principal case, the pledgee without notice, of a non-negotiable security. It is horn-book law that the assignee of a non-negotiable security takes the same subject to all the equities existing against the assignor. At common law a pawnee might sell, assign or pledge his interest in the pawn. But should the pawnee undertake to pledge the property, not being negotiable securities, for a debt beyond his own, he would be guilty of a breach of trust, and would acquire no title beyond that held by the pawnee: *Story on Bailments*, sec. 324. This statement is rested by Story upon a Massachusetts case, and some very early English cases. The former, however, hardly seems authority for such a conclusion, because it was decided solely upon the ground that certain pledged securities were negotiable, which, of course, altered the whole question, while the latter has been said, "rather to justify the liberty to repledge on the inference drawn by and stated in the reporter's marginal note, than to lay it down as a proposition already established by authority:" *Tyler on Usury* 567. The question was finally settled in England by the two recent cases of *Donald v. Suckling*, Law Rep., 1 Q. B. 585, and *Halliday v. Holgate*, Id., 3 Exch. 299. In Pennsylvania, as early

as *Thompson v. Patrick*, 4 Watts 414, the right of the pledgee to re-pledge to the extent of his interest was established, but in 1878, an act was passed by the legislature of that state (Purd. 2107) prohibiting under penalty of heavy fine and imprisonment, the repledging of any stock, bonds or other securities, without the consent of the pledgor. This statute was hastily drawn and carelessly expressed. It aimed to cure an evil, and ended by making the remedy worse than the disease. It was violated, and necessarily violated, every day in a thousand cases, and rendered any broker liable to a heavy fine and several years in the penitentiary, at the instance of any spiteful or vindictive customer, for doing what had long been recognised as perfectly valid by the common law of Pennsylvania. Accordingly, at the last session of the legislature, the following proviso was added, viz., "That this act shall not be construed to prevent brokers from pledging or hypothecating stock or other securities, which they have purchased, in whole or in part, with their own money or credit for others, and for which they have not been wholly reimbursed by the parties for whom such stocks or other securities have been purchased:" Act June 10th 1881, Pamph. L. 107.

The contention in the principal case does not, as will be observed, arise as to the legality of the sub-pledge, but from the claim of the sub-pledgee to the ownership purged from all equities existing against his assignor. The leading New York case of *McNeil v. Tenth National Bank* is a good illustration of the question in hand. Plaintiff kept an account with a firm of stock brokers in New York, relating to certain stocks which they had purchased and were carrying for him. For the purpose of securing any balance that might become due them, the plaintiff delivered to them a certificate for a number of shares in the stock of the St. Johnsville Bank,

with the usual blank assignment and power. The stock brokers pledged this to another firm, who in turn pledged it to the defendant. All this was without plaintiff's knowledge. He was indebted to them on the account for which the shares were pledged to them in a very small amount, but no account had been rendered nor any demand made. The court held the defendants entitled to hold the stock. In a recent Pennsylvania case the court went a step further. One of four executors put into a broker's hands stock of his decedent's estate, with a bill of sale and power annexed, signed "A. B., Acting Executor," as collateral security for a personal indebtedness; the broker, who knew of the fraud, pledged the stock to defendant, who advanced money to him thereon in good faith. The defendant's title was pronounced unimpeachable: *Wood v. Smith*, 37 Leg. Int. 315. *Mt. Holly Turnpike Co. v. Ferree*, 2 C. E. Green 117; *Prall v. Tilt*, 28 N. J. Eq. 479; *Moore v. Metrop. Nat. Bank*, 55 N. Y. 46; *Penna. Railroad Co.'s Appeal*, 5 W. N. C. 22; *Wallace v. Boyd*, 10 Id. 256.

It may be asked then, are not certificates of stock negotiable? By no means. An examination of the cases will show that the decisions rest solely upon the ground of estoppel. There can be no doubt that simply intrusting to another possession of a chattel will not protect a purchaser from the bailee, however *bona fide*. As was said by Mr. Justice WOODWARD in *Quinn v. Davis*, 28 P. F. Smith 18, "The owner of a chattel cannot, apart from legal process, be divested of his title to it, except as a consequence of some unlawful or improvident act of his own. The transfer of possession to another without more is not such an act."

"But," as was said in *McNeil v. Tenth National Bank*, *supra*, "if the owner intrusts to another not merely the possession of the property, but also the written evidence over his own signature

of title thereto, and of unconditional power of disposition over it, the case is vastly different." By the negligence of the pledgor in signing and delivering the blank bill of sale and power, an innocent purchaser for value is deceived; hence, the familiar principle comes into play, sanctioned alike by equity and common sense, that when one of two innocent parties must suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act: *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. 248. Surely, this is

no new principle of law: *Taylor v. Gitt*, 10 Barr 428; *McMullen v. Wenner*, 16 S. & R. 21; *Mott v. Clark*, 9 Barr 405.

Are pledgors, then, to be at the mercy of pledgees? By no means. Their check upon an unauthorized disposition of their stock by the pledgee is to make the certificate "pledged" or "collateral," stating, if necessary, the amount for which it is pawned. Thus, any subsequent purchaser would readily become affected with notice, and much difficulty be thereby avoided.

FRANCIS A. LEWIS, Jr.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ILLINOIS.²

SUPREME JUDICIAL COURT OF MAINE.³

COURT OF ERRORS AND APPEALS OF MARYLAND.⁴

SUPREME COURT OF MISSOURI.⁵

COURT OF CHANCERY OF NEW JERSEY.⁶

SUPREME COURT OF TENNESSEE.⁷

SUPREME COURT OF VERMONT.⁸

ACKNOWLEDGMENT.

Impeachment of—Proof Necessary.—To impeach the certificate of the acknowledgment of a deed, the proof must show a conspiracy between the officer taking the acknowledgment and the grantee, or that the officer practiced imposition or fraud upon the grantor, and the testimony of the grantor alone is not sufficient to overcome the certificate and the officer's testimony in support of the same: *Fitzgerald v. Fitzgerald*, 100 Ill.

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

² From Hon. N. L. Freeman, Reporter; to appear in 100 Illinois Reports.

³ From J. W. Spaulding, Esq., Reporter; to appear in 72 Maine Reports.

⁴ From J. Shaaff Stockett, Esq., Reporter; to appear in 54 and 55 Md. Reports.

⁵ From T. K. Skinker, Esq., Reporter; to appear in 73 Missouri Reports.

⁶ From Hon. John H. Stewart, Reporter; to appear in 34 N. J. Eq. Reports.

⁷ From Hon. Benjamin J. Lea, Reporter; the cases will probably appear in 5 or 6 Lea.

⁸ From Edwin F. Palmer, Esq., Reporter; to appear in 53 Vermont Reports.

Officer de facto—The sufficiency of the acknowledgment of a deed was questioned on the ground that the deputy clerk who took the acknowledgment had not been legally appointed. The law required deputy clerks to take an oath for the faithful discharge of the duties of their offices. It appeared that in this instance the deputy was only verbally appointed as such, that he was never sworn into office, nor executed any bond as deputy, but that he was acting as such deputy, and had taken other acknowledgments in the same manner. It was *held*, the deputy was at least an *officer de facto*, and his act in taking the acknowledgment was valid: *Sharp v. Thompson*, 100 Ill.

ACTION. See *Husband and Wife*.

AGENT.

Notice—Knowledge of Agent before Employment.—A notice to a bank director or trustee, or knowledge obtained by him while not engaged either officially or as an agent or attorney in the business of the bank, is inoperative as a notice to the bank: *Fairfield Savings Bank v. Chase*, 72 Me.

Knowledge of an agent obtained prior to his employment as agent, and which he has no personal interest to conceal, will be an implied or imputed notice to the principal, when the knowledge is so fully in mind that it could not at the time have been forgotten, and relates to a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal. In such case, the presumption that an agent will do what it is his duty to do, having no personal motive or interest to do the contrary, is so strong that the law does not allow it to be denied: *Id.*

ASSUMPSIT. See *Sale*.

ATTACHMENT. See *Fraud*

Garnishee—Cannot contest Judgment.—A garnishee cannot contest the validity of the judgment, on which the garnishment is based, because of the failure to comply with all the provisions of the code in relation to judgments by confession: *Cowan v. Lowry*, 5 or 6 Lea.

ATTORNEY.

Retainer Fee—Usage.—The proper scope and application of the right to charge retainers, is to remunerate counsel for being deprived, by being retained by one party, of the opportunity of rendering services for and receiving pay from the other: *McLellan v. Hayford*, 72 Me.

There is no such general usage or custom among lawyers in Maine, to charge retainers in all contested cases in which they are employed, as to justify an instruction to the jury, as a matter of law, that in contested cases and for reasonable amounts such fees were a legal charge in each case in which he was engaged. And such an instruction, in an action by an attorney at law, for services and disbursements in behalf of a client, is erroneous, when the account sued embraces, besides the charges of retainers in each contested case, other charges covering all the services actually performed, and disbursements made in behalf of his client: *Id.*

BANK.

Account by Depositor as Agent—Deposit of Trust Moneys therein—

Not subject to Lien for Debt due, Bank.—When a bank's account is opened in the name of a depositor, as general agent, and it is known to the bank that he is the agent of an insurance company; that conducting its agency is his chief business; that the account was opened to facilitate that business, and used as a means of accumulating the premiums on policies collected by him for it, and of making payment to it by checks; the bank is chargeable with notice of the equitable rights of the company, although the depositor deposited other moneys in the same account, and drew checks upon it for his private use. And the insurance company may enforce, by bill in equity, its beneficial ownership therein against the bank claiming a lien upon the balance thereof for a debt due to it from the depositor, contracted for his individual use: *Central National Bank of Baltimore v. Conn. Mutual Life Ins. Co.*, S. C. U. S., Oct. Term 1881.

A banker's lien ordinarily attaches in favor of the bank, upon the securities and moneys of the customer, deposited in the usual course of business for advances which are supposed to be made upon their credit, not only against the depositor, but against the unknown equities of all others in interest. But it cannot be permitted to prevail against the equity of the beneficial owner, of which the bank has notice, either actual or constructive: *Id.*

BILLS AND NOTES. See *Evidence*.

Promissory Note—Liability of Signers among themselves—One who signs a note after it has been delivered, and after the consideration has passed between the original parties, incurs no liability thereon: *McMahan v. Geiger*, 73 Mo.

One who signs a note after others, and without any knowledge or explanation as to the character in which they have signed, may assume that they are joint-makers, and he will become liable either as surety or guarantor for all of them, but whether as surety or guarantor is not decided. As against him it cannot afterward be shown that one of the original signers was a surety, for the purpose of charging him as a co-surety: *Id.*

Blank Endorsement—Construction—Evidence.—The contract entered into by a blank endorsement of a promissory note will receive such a construction as will give effect to the intention of the parties, and parol evidence will be admitted to show and explain what liabilities were intended to be assumed at the time of the transaction: *Owings v. Baker*, 54 Md.

A third party who places his name on the back of a note before it is endorsed by the payee, may avoid the liability of a joint promissor which the law, in the absence of proof to the contrary, attaches to such an endorsement, by proving a different understanding of all the parties at the time of the transaction. But an agreement to such effect between the drawer and a blank endorser alone, without the assent of the payee, will not suffice: *Id.*

BROKER.

Duties—Compensation—A broker is entitled to compensation when he has found for his employer one who makes a written contract for the purchase or sale of the property to be bought or sold: *Veazie v. Parker*, 72 Me.

It is no part of the broker's duty to direct or advise as to the terms of the contract between the parties, or explain the meaning of the words used by them: *Id.*

Conversations between buyer and seller before and after the making of the contract are not admissible to affect the broker's right to compensation: *Id.*

CHARITY.

School of Learning—Foreign Charity.—A gift of a fund to establish and maintain a school of learning is a charitable trust: *Taylor's Exr's v. Trustees of Bryn Mawr College*, 34 N. J. Eq.

This court will not administer a foreign charity; but, where such a charity is valid by the laws of this state, and by the laws of the state where it is to be executed, and the trustees have the legal capacity to receive the fund and carry out the charity, this court will order its payment to them: *Id.*

COMMON CARRIER.

Railroad—Extent of Liability—Deposit in Warehouse.—The duty of a railroad company is to convey freight to the place directed, and to deliver it to the party entitled, if there ready to receive it, and, if not, to store it for him. The liability of the company, as a common carrier, ceases when the freight is deposited in a warehouse, and is not extended by the Act of 1870, c. 17, Code, sect. 1993, j., requiring the company to give prescribed notice to the consignee: *Butler v. Railroad Co.*, 5 or 6 Lea.

CONFLICT OF LAWS.

Law of Sister State—Evidence.—The law of a sister state is a question of fact, to be proved, like any other fact, by appropriate evidence. In the absence of such evidence, it will be presumed that the common law is in force: *Meyer v. McCabe*, 73 Mo.

CONSTITUTIONAL LAW. See *Taxation.*

CONTRACT.

Substitution—Novation.—A owed B, and C owed A: by agreement of the three, C gave his note to B, and was substituted in place of A as B's debtor. C was insolvent at the time, but this fact was unknown to all the parties. Held, that the loss fell on B: *Cudens v. Teasdale*, 53 Vt.

CORPORATION.

Insolvency—Assets—Trust Fund.—The assets of an insolvent corporation are not turned into a trust fund for the benefit of creditors by the mere knowledge of its officers of its insolvency, but only by some positive acts of insolvency, such as the making of a general assignment, the filing of a bill to administer its assets, or the permanent cessation of business; and it is only what remains due from a customer, after the settlement of mutual debts, that would constitute the trust fund: *Comfort v. McTeer*, 5 or 6 Lea.

Where, therefore, after knowledge of its insolvency, but two days before it ceased to transact business, the officers of a bank entered a credit on the account of one of its customers, which was justified by the dealings between the parties, it was held that the assignee of the

bank, under a general assignment for the benefit of creditors, subsequently made, was bound by the transaction : *Id.*

CRIMINAL LAW.

Ignorance of the Law no Excuse—Larceny.—Sect. 1315 Rev. Stats. 1879, makes it larceny for the finder of lost property to make way with or secrete the property with intent to convert it to his own use, with intent to defraud the owner. In an indictment founded on this section : *Hel-l*, that evidence offered by the defendant to show that it was a general belief among the colored people that property found, having no marks upon it to indicate its ownership, belonged to the finder, was properly excluded. Ignorance of the law is no excuse for its violation : *State v. Welch*, 73 Mo.

DAM. See *Waters and Watercourses.*

DEBTOR AND CREDITOR. See *Injunction.*

Composition—Bona Fide Purchaser—Estoppel.—If creditors enter into a composition agreement with their debtor and sign a receipt for the agreed amount, and a third party relying upon this, in good faith advances money to the debtor to enable him to settle with his creditors, and in consideration of the advances, receives a transfer of property from the debtor, the transfer will be valid as against the creditors, though they are in fact never paid. This is not upon the principle of estoppel, but because the transferee is a *bona fide* purchaser : *Kuhn v. Weil*, 73 Mo.

Trust Assignment—Acceptance—Attacking Creditor.—The acceptance by the trustee of a general assignment for the benefit of creditors, before the filing of a bill attacking the validity of the assignment, would enure to the benefit of such of the secured creditors as might, within a reasonable time, come in under the assignment, and give them a prior right to the attacking creditor, whose bill was filed in advance of their formal acceptance : *Nailer v. Young*, 5 or 6 Lea.

The presumption of the acceptance by the beneficiaries of a trust assignment in their favor, which the law implies when the conveyance is made with the formalities necessary to pass the title to the property, or perfect the trust, would perhaps be equally effective, and certainly if supplemented by actual acceptance within a reasonable time : *Id.*

DEED.

Inconsistent Descriptions—Construction.—It is a rule of construction that where there is a doubt as to the construction of a deed, it shall be taken most favorably for the grantee. If there are two descriptions in a deed of the land conveyed, and they do not coincide, the grantee is at liberty to elect that which is most favorable to him : *Sharp v. Thompson*, 100 Ill.

ELECTION.

Irregularities in Conducting, not Fatal.—Mere irregularities in conducting an election and counting the votes, not proceeding from any wrongful intent, which deprive no legal voter of his vote and do not change the result, will not vitiate the election so as to justify the rejection.

tion of the entire poll of the town or precinct in which the irregularities occurred: *Hodge v. Linn*, 100 Ill.

EQUITY.

Bills of Review—When Performance of Decree not Essential.—As to bills of review, which relate to errors on the face of the decree alone, and which therefore may be filed without leave, the rule requiring previous performance of the decree, does not apply. Whether the courts will enter upon an inquiry as to the errors, without requiring performance of the decree, depends upon the exercise of a sound judicial discretion applied to the facts of the particular case: *Davis v. Speiden*, S. C. U. S., Oct. Term 1881.

Pleading—Presumption of Payment—Demurrer.—A presumption of payment of a mortgage from lapse of time may be raised by a demurrer, and such a demurrer does not admit the allegations of a bill that both the principal and interest of the mortgage are now due and owing, because such allegations are rather conclusions than averments of facts: *Olden v. Hubbard*, 34 N. J. Eq.

Any existing circumstances which would repel such presumption must be averred in the bill: *Id.*

Insufficient Pleas—Failure to file Replication.—Pleas in equity must allege matters of fact and not mere conclusions of law, and if not traversable for that reason, or if they have been filed irregularly, for lack of the affidavit of the party and certificate of counsel required by the 31st equity rule, they may be disregarded: *Central Nat. Bank v. Conn. Mut. Life Ins. Co.*, S. C. U. S., Oct. Term 1881.

When an equity cause has been heard upon the merits upon bill, answer and proofs taken, as upon issue perfected, the want of a formal replication cannot be assigned as error upon appeal: *Id.*

Pleading—Cross Bills.—A cross bill is a mode of defence or an auxiliary suit, and constitutes one cause with the original bill, and a cross bill will not, therefore, lie where there is no connection between the demands or the parties: *Comfort v. McTeer*, 5 or 6 Lea.

ERRORS AND APPEALS. See Equity.

Admiralty—Omission of finding of Facts—Certiorari to certify findings.—To 'justify the Supreme Court in returning an admiralty cause, for the purpose of having findings of fact stated and put into the record, it must clearly appear that the omission of such findings was attributable to the fault or neglect of the court and not to the parties: *Winslow v. Wilcox*, S. C. U. S., Oct. Term 1881.

Appeal from Circuit Court—Acts of Congress of 1802 and 1872.—Under sect. 693, Revised Statutes, final judgments of the circuit courts in civil actions wherein there has been a division of opinion of the judges are only reviewable on writ of error or appeal. The Act of 1802 (2 stat. 159, c. 31, sect. 6), which allowed the questions to be certified up before judgment was suspended by the Act of July 1st 1872 (17 stat. 196, c. 255, sect. 1): *Banking House v. Trustees of Schools*, S. C. U. S., Oct. Term 1881.

EVIDENCE. See *Mortgage; Sale*.

Written Contract—Endorsement of Note—Cannot be varied by Parol.—The contract created by the endorsement and delivery of a negotiable note is not an implied contract, but an express contract, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are omitted. All its terms are certain and well understood. It is therefore subject to the rule which excludes parol proof to alter or vary the terms of an express written agreement: *Martin v. Cole*, S. C. U. S., Oct. Term 1881.

Susquehanna Bridge Co v. Evans, 4 Wash. C. C. Rep. 480, and *Ross v. Espy*, 66 Penna. St. 483, dissented from, and *Davis v. Brown*, 94 U. S. 423, distinguished: *Id.*

FOREIGN LAW. See *Conflict of Laws*.

FRAUD.

Attachment—What constitutes fraudulent "disposition" of Property.—Sect. 398 Rev. Stats. 1879, authorizes attachment to issue in the following, among other cases: (7) Where the defendant has fraudulently conveyed or assigned his property so as to hinder or delay his creditors. (8) Where the defendant has fraudulently concealed, removed or *disposed* of his property or effects so as to hinder, &c. *Held*, that the word *disposed*, as here used, covers all such alienations of property as may be made in ways not otherwise pointed out in the statute—for example, pledges, gifts, pawns, bailments and other transfers and alienations which may be effected by mere delivery and without the use of any writing, assignment or conveyance. It does not include any species of conveyance. Hence, a charge that defendant has fraudulently disposed of his property is not supported by proof that he has executed a fraudulent mortgage: *Bullene v. Smith*, 73 Mo.

GUARANTY.

When Notice of Acceptance not necessary—Waiver of Notice of default of Debtor—Rule as to Construction.—The rule requiring notice of the acceptance of a guaranty, and of an intention to act under it, applies only where the instrument is merely an offer, and not where it is made at the request of the creditor, or is for a valuable consideration, or is, in form, a bilateral contract: *Davis v. Wells*, S. C. U. S., Oct. Term 1881.

Where the guaranty is expressed to be in consideration of one dollar paid to the guarantor by the guarantee, the receipt whereof is therein acknowledged, it is binding without notice of acceptance: *Id.*

Where a guaranty declares that the guarantor thereby guarantees unto the guarantee unconditionally at all times any advances, &c., to a third person, notice of demand of payment and the default of the debtor is waived, as well as notice of the amount of the advances when made: *Id.*

But a failure or delay in giving such notice, if required, is no defence to an action on the guaranty unless loss or damage has thereby accrued, and then only for the amount of such damage: *Id.*

Notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit, and liberally, to promote the use and convenience of commercial intercourse: *Id.*

HIGHWAY. See *Sheriff*.

When defective—Notice.—Mere slipperiness of a highway or sidewalk, caused by either ice or snow, is not a defect for which towns and cities are liable: *Smith v. Bangor*, 72 Me.

The actual notice to some one of the municipal officers, required by statute, must be a notice of the identical defect which caused the injury. Notice of another defect, or of the existence of a cause likely to produce the defect, is not sufficient: *Id.*

Notice of a defect in a way cannot be proved by the admission of a town or city officer, though the declarations of such an officer, which accompanies his official acts and tend to explain them, are admissible: *Id.*

HUSBAND AND WIFE.

Married Women—Divorce.—A woman who is divorced can maintain an action against her former husband for personal service performed for him before their marriage: *Carlton v. Carlton*, 72 Me.

Wife's Separate Estate—Mortgage for Husband's Debt.—A married woman may, with her husband, mortgage her own lands to secure the payment of his debts or those of any other person, for the payment of which she is in no way liable: *Merchant v. Thompson*, 34 N. J. Eq.

Jointure—Account between Husband's Representative and Widow.—A covenant contained in a deed of jointure provided that the husband should invest his wife's separate estate, and account to her for the income and for the rents of her real estate. After the marriage he received all of her personal property and invested it, but never accounted for nor paid to her the income thereof, nor the rents of her real estate, which he also received. *Held*, that his representative was, after his decease, liable to account to her therefor, with interest, to be calculated with yearly rests: *Middaugh v. Trimmer*, 34 N. J. Eq.

ICE. See *Waters and Watercourses*.

INJUNCTION.

Judgment Creditor—Levy on Land in hands of Grantee.—An allegation in a bill that the defendant, by virtue of a judgment and execution at law against complainant's grantor, has seized upon and is about to sell lands to which complainant has the legal title, presents no equitable ground for enjoining such sale: *Sheldon v. Stokes*, 34 N. J. Eq.

INSURANCE.

Forfeiture for non-payment of Premium—Equity will not relieve against.—The facts that a policy was taken out by the assured without the knowledge of his wife, in whose favor it was made payable; that from a period prior to the falling due of the premium down to the date of his death, he was, in consequence of illness, deranged in mind, and incapable of attending to business, and for that reason alone the premium was not paid, furnish no ground upon which a court of equity can relieve against the forfeiture: *Klein v. New York Life Ins. Co.*, S. C. U. S., Oct. Term 1881.

In a contract of life insurance, the company take the risk of having to pay, even though the assured die the day after taking out the policy, and the assured takes the risk of having to pay premiums during his

entire life, even though they amount to more than the policy. The assured also takes the risk of forfeiture for non-payment of any premium when due. Neither party has any claim to be relieved in equity from loss consequent on these risks: *Id.*

LANDLORD AND TENANT. See *Waters and Watercourses.*

LIMITATIONS, STATUTE OF.

Joint Note—Payment by one Party.—In an action on a joint and several promissory note against one of two makers, to which he pleaded payment and limitations, evidence was admissible of payment of items of interest and of part of the principal by the co-maker, who was dead when the suit was brought, endorsed on the note in his handwriting, and of admissions by the maker sued, to take the note out of the operation of the Statute of Limitations, and show that it was the latter's debt: *Burgoon v. Bixler*, 54 Md.

MORTGAGE. See *Husband and Wife.*

Payment by Third Party on account of First Mortgage—Subrogation.—After a second mortgage had been taken on certain lands, a payment of part of the principal of the first mortgage was made by a brother of the mortgagor, under an agreement between the holder of the mortgage and the mortgagor and his brother, that the latter should be subrogated to the rights of the mortgagee under the mortgage for those payments. *Held*, that, as against the holder of the second mortgage, such conventional subrogation could be enforced. The payments were, in fact, made after the second mortgage was given: *Shreve v. Hankinson*, 34 N. J. Eq.

Lien in favor of Mortgagee for Taxes paid by him.—Subrogation.—Where it is the duty of a mortgagor to pay the taxes upon the mortgaged premises, and upon his failure to do so they are paid by the mortgagee, the latter will be subrogated to the rights of the state, which has a lien upon the land for the taxes, and upon foreclosure of the mortgage it will be proper to decree a lien upon the premises in favor of the mortgagee for the taxes so paid by him: *Sharp v. Thomson*, 100 Ill.

Parol Evidence to reform Writing—Error of Fact—Bill to reform a Mortgage.—In a proceeding in equity to reform a mortgage, parol evidence is admissible to prove the real contract: *Tabor v. Cilley*, 53 Vt.

Courts of equity will not refuse redress if it is certain that the written contract conveys a different right, or, effectuates a different purpose from that intended by the parties; and will treat the mistake as one of fact: *Id.*

But courts of equity will not reform and enlarge a mortgage executed by one who is insolvent if the rights of third parties would be changed and injured thereby. In this case, if the mortgage had been larger when it was given, the other creditors would have instituted proceedings in insolvency before the orator's lien became absolute: *Id.*

Purchase by Mortgagee at his own Sale.—A purchase by a mortgagee at his own sale under a chattel mortgage will not be set aside and a redemption allowed, where the sale and purchase were made with the

consent of the mortgagor, and under an understanding with him: *Goodell v. Dewey*, 100 Ill.

MUNICIPAL CORPORATION. See *Highway*.

NATIONAL BANK.

Voluntary Liquidation—Liability to subsequent Suit by Creditor—Concurrent Bill to enforce Stockholder's Liability.—A national bank in voluntary liquidation, under sect. 5220 of the Revised Statutes, is not thereby dissolved as a corporation, but may sue and be sued by name for the purpose of winding up its business, and it is no defence to a suit by a creditor upon a disputed claim that the creditor has also filed a creditor's bill, under sect. 2 of the Act of June 30th 1876, authorizing the appointment of receivers of national banks, and for other purposes, to enforce the individual liability of its shareholders: *Central National Bank v. Conn. Mutual Life Ins. Co.*, S. C. U. S., Oct. Term 1881.

NEGLIGENCE.

Custom Officers—Liability of Wharf Owners to—Due Care—Contributory Negligence.—The owners of a wharf where foreign laden vessels discharge, are liable to custom officers, who are required to visit the premises in the performance of their duties, for personal injuries received while in the exercise of due care, because of the unsafe or unsuitable condition of the wharf: *Low v. Grand Trunk Railway Co.*, 72 Me.

A customs officer whose duty is to watch for smugglers and prevent smuggling, may be in the exercise of due care, when in the course of his duty he passes over a wharf, where a foreign laden vessel is lying, in the night-time and without a lantern: *Id.*

Where duty requires one to be concealed, as when watching for smugglers and evil-doers in the night-time, the fact that he does not carry a light is not contributory negligence in an action for damages sustained by the negligence of one whose business imposed the duty upon the plaintiff: *Id.*

Master and Servant—Independent Contractor.—The obligations existing between master and servant do not exist between employer and contractor. An employer is not liable to others for injuries resulting from the negligence of a contractor, although the employer may have known that the contractor was of bad character: *Dobson v. Iron Co.*, 5 or 6 Lea.

Whether a person in the performance of work for another is a servant or contractor depends upon whether he represents the will of the principal in the management and details of the work: *Id.*

Master and Servant—Superior Servant.—Where a section hand on a railroad, in consequence of the negligence of the section boss in running a "crank car" backwards, falls from the car and is injured, he may maintain an action against the company: *Railroad Co. v. Nelson*, 5 or 6 Lea.

NOTICE. See *Agent*.

NUISANCE. See *Sheriff*.

OFFICER. See *Acknowledgment*.

PARTNERSHIP.

Liability for Torts of Co-partner in the Business.—A partner has authority by reason of the partnership relation, and without the express assent of his co-partners, to sue in the name of all the co-partners for the recovery of a partnership debt; and if the suit be by attachment, and goods of a stranger are wrongfully seized by order of one, all the co-partners will be liable: *Kuhn v. Weil*, 73 Mo.

Real Estate—When treated as Personal Property—Right of Surviving Partner to sell—Equitable Title of Purchaser.—Real estate purchased with partnership funds for partnership purposes, though the title be taken in the individual name of one or both partners, is, in equity, treated as personal property so far as is necessary to pay the debts of the partnership and to adjust the equities of the co-partners: *Shanks v. Klein*, S. C. U. S., Oct. Term 1881.

For this purpose, in case of the death of one of the partners, the survivor can sell real estate so situated; and, though he cannot convey the legal title which passed to the heir or devisee of the deceased partner, his sale invests the purchaser with the equitable ownership of the real estate and the right to compel a conveyance of the title from the heir or devisee in a court of equity: *Id.*

PATENT.

Extent of.—The scope of letters patent should be limited to the invention covered by the claim; and, though the claim may be illustrated, it cannot be enlarged by the language used in other parts of the specification: *Lehigh Valley Railroad Co. v. Mellon*, S. C. U. S., Oct. Term 1881.

PLEADING. See *Equity*.

PRESUMPTION OF PAYMENT. See *Equity*

RECEIVER.

Expenditure without Authority of Court.—While, as a general rule, a receiver will not be permitted to lay out more than a small sum at his own discretion, in the preservation or improvement of the property under his charge, but should, in all cases where it is practicable, or the circumstances of the case will permit, before involving the estate in expense, apply to the court for authority for so doing, this general rule should not be so rigidly enforced as to work wrong and injustice, where the receiver has acted in good faith, and under such circumstances as will enable the court to see that if previous authority had been applied for it would have been granted: *Brown v. Hazlehurst*, 54 Md.

SALE.

Assumpsit—Duty of Vendor and Vendee when Property is sold on Trial.—Indebitatus assumpsit lies to recover the price of an article delivered on a written order, and in such case the writing is admissible evidence: *Gibson v. Vail*, 53 Vt.

Ordinarily, when property is sold on trial, the vendee must notify the vendor of the failure in a reasonable time, but otherwise when the vendor agrees to examine the working of the article and learn the result himself: *Id.*

It is a species of fraud to sell an article on trial for a particular purpose, when the vendor knows, or ought to have known, from his certain knowledge, of the facilities of the vendee in using it, that it must necessarily result in failure: *Id.*

Conversations of the parties, after the written contract is made, about the setting up and manner of using milk-pans sold on trial, are admissible: *Id.*

SHERIFF.

Deputy—Power to abate Nuisance—Obstruction of Highway.—A person appointed in writing by the sheriff to act as deputy-sheriff, possesses authority such as the sheriff himself may exercise: *Turner v. Holtzman*, 54 Md.

The sheriff or his deputy may abate a public nuisance in a public highway: *Id.*

In an action for assault, against a person who had been authorized in writing by the sheriff to act as his deputy, at a camp-meeting, and his assistant, brought by the driver of a public coach, it was held, 1st. That the defendant, as deputy-sheriff, had the lawful authority to remove the coach of the plaintiff when he found it obstructing the public highway, and preventing other parties, who had the right to use the same, from travelling upon it, and to remove the plaintiff with it if he should resist him in its removal. 2d. That he also had the right to call to his assistance the other defendant, and such other persons as he might deem necessary in effecting the abatement of the nuisance thus caused and maintained by the plaintiff: *Id.*

SUBROGATION. See *Mortgage*.

TAXATION.

Farm Property within City Limits—Taxation of for City Purposes—When not a taking of Property without due Process of Law.—In this country and in England, the necessities of government, the nature of the duties to be performed, and custom and usage, have established a procedure in regard to the levy and collection of taxes which differs from proceedings in courts of justice, but which is still "due process of law" within the meaning of the Constitution: *Kelly v. City of Pittsburgh*; S. C. U. S., Oct. Term 1881.

What parts of a state, shall for local purposes, be governed by a county, a town or a city government, and the character of the land included in each, are matters of detail within the legislative discretion: *Id.*

When the taxes levied by a city upon land are clearly for a proper public purpose, and are authorized by statute, the court cannot say that such statute deprives the owner of his property without "due process of law" because the land is farm land, and does not reap the same benefits as land in the heart of the city: *Id.*

Interest in Vessel employed in Foreign Commerce.—The interest of a citizen of Maryland, and resident of Baltimore, as part owner of vessels employed in foreign commerce, registered as vessels of the United States in the office of the collector of customs at Baltimore, the home port of the vessels, and the domicile and usual place of residence of their acting and managing owners, is liable for annual taxes levied on it for

municipal purposes by the authorities of that city; and such taxation does not contravene the Constitution of the United States: *Gunther v. The Mayor and City Council of Baltimore*, 55 Md.

TELEGRAPH.

Evidence—Which is the Original Message and which is the Copy—Secondary proof—Statute of Frauds.—The message sent to a telegraph office to be transmitted in reply to one received is the original, and not the message received at the place to which it is transmitted. The latter must be considered as a copy, and carries with it none of the qualities of primary evidence: *Smith v. Easton*, 54 Md.

Ordinarily, the usual course is to show the delivery of the original message of the party sought to be charged, at the office from which it is to be telegraphed, and then show that it was transmitted and delivered at the place of its destination: *Id.*

But even where the original is produced, its authenticity must be established. And this either by proof of the handwriting, or by other proof establishing its genuineness.

The destruction of all the messages sent from the office on the day of its transmission is sufficient foundation for the admissibility of secondary evidence. But this secondary evidence can only be admitted upon proof that the copy offered is a correct transcript of a message actually authorized by the party sought to be affected by its contents: *Id.*

While the rule which permits a letter to be admitted in evidence against a party where there is no other proof of the handwriting, except the fact, that in due course it had been received in reply to a letter which had been addressed to the same party, may apply to a dispatch in answer to a communication by letter, it is inappropriate to a dispatch received in reply to a communication received by telegraph: *Id.*

A telegraphic dispatch is a sufficient compliance with the Statute of Frauds, in its requirement that a promise to guarantee the debt of another should be in writing: *Id.*

TORT.

Promise of Marriage by Married Man.—It is an actionable offence for a married man to offer himself in marriage to an unmarried woman, paying his addresses to her, and entering into a contract of marriage with her; and a declaration counting *tort-wise* for fraud is held good on demurrer: *Pollock v. Sullivan*, 53 Vt.

TRUSTEES.

Personal Liability for Purchases authorized by Court.—Defendants to whom a deed in trust was made of property for the benefit of the grantor's creditors, and who were authorized by order of a court of equity to complete certain houses thereby conveyed to them, in course of building when the deed was made, are responsible in their individual capacity, for work and materials furnished by a plaintiff upon their order, for the completion of the buildings, it appearing that there was no agreement on his part to look to the trust estate alone for payment. The order of court was an indemnity to the trustees for having the work done, to be allowed them out of the trust funds: *Gill v. Carmine*, 55 Md.

USURY.

May be taken advantage of without Plea—Renewal of Notes.—When one has paid usury he is entitled to have it deducted as an equitable offset without plea or answer: *Cross v. Mann*, 53 Vt.

Substituting new notes and a new mortgage for old ones does not change the debt; and usury paid on the old debt may be deducted in ascertaining the amount due on the last mortgage when foreclosed. *Id.*

Distinction between this case and those cases seeking to apply usury paid on one debt upon another debt: *Id.*

When overdue notes are transferred, usury paid to the original owner may be deducted: *Id.*

VENDOR AND PURCHASER.

Lien for Purchase-money payable in Instalments—Remedies upon default in Payment—Waiver.—If a vendor who has conveyed an absolute estate in land to his vendee and has a vendor's lien thereon for unpaid instalments of the purchase-money, upon default in payment of an earlier instalment sues upon it, and obtains a personal judgment against the vendee and causes the land to be sold under execution in satisfaction of the judgment, he cannot, upon default in payment of a later instalment, enforce his vendor's lien against the land. By electing to proceed at law, he will be deemed to have waived his remedy in equity, and the purchaser will take the land discharged of any further liability for the debt. The rule is otherwise where the vendor, instead of conveying in fee, has given a bond for a deed to be executed upon payment of the purchase-money: *Dickason v. Eby*, 73 Mo.

WATERS AND WATERCOURSES.

Ice-pond—Tide Waters—Dam—Prescription.—A dam built across an arm of the sea, into which a fresh-water creek empties, to exclude the salt water for the purpose of creating a fresh-water pond, upon which to cultivate and harvest ice for the market, without direct authority of the legislature or the delegated action of harbor commissioners, if the case falls within their jurisdiction, is in the same sense a public nuisance as it would be to build a solid wall across a road or street: *Dyer v. Curtis*, 72 Me.

Without such authority, such a dam never acquires the right to exist by prescription: *Id.*

Where, by the terms of a lease, the lessor agreed to keep up such a dam during a certain portion of the year, in consideration of the covenants of the lease, it was held to be an illegal contract: *Id.*

No rule precludes either party from showing the illegality of a lease void from public policy: *Id.*

A deed of a tide-mill privilege, mill-dam, wharf privilege and the right to flow the creek and adjoining lands to high-water mark, "and all the rights and highways connected with and belonging to said mill privilege," gives the grantee no right to ice-cutting, nor title to the ice formed upon a fresh-water pond raised by changing the dam so as to exclude the salt water: *Id.*

WHARF. See *Negligence*.

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MARITIME LIENS.

(Continued from p. 80, ante.)

THE lien of the material-man is the product of a later age, its origin and history too are essentially different from that of maritime liens in general, it has no necessary connection with shipping, but is merely a link in the chain, a relic of that system of implied hypothecation existing under the civil law. Contracts of the character alluded to are in the institution called *re* or *real*,¹ and include, therefore, both the *pignus* and *hypotheca*, the former arising from the express act of the parties, the latter from the implication of law.

The *pignus*, which bears a decided analogy to our English *pledge*, was the delivery of a thing to a creditor as a security for an advance or loan, the condition of obligation being that it should be by him restored on payment of the debt, or in default thereof a sale followed: Schouler on Bailments 161. The sale might be either public or private, judicial or non-judicial, as determined by the parties: Addison on Cont. 1017. The property pledged might be either lands or chattels, it might be either with or without life, it might be of a character either to yield or not to yield increase.² The essential requisite of the contract was the transfer of possession. The title remained in the borrower, the creditor was bound to account for the profits, if any, and to use ordinary

¹ They are so called because of their not being perfected until something had passed from one to the other.

² If no express stipulation be made, the law required notice to be given.

care and diligence in the preservation of the subject. If the thing pawned was movable or adapted to personal use or yielding fruits, the creditor could neither use it, wear it nor appropriate its increase to his own use unless the contract contained an express stipulation to that effect: *Studies in Roman Law* (Mackenzie) 202, 203. The *hypotheca*¹ was a step onward, and its existence evidences the growing confidence felt in the power of the law.

The creditor had neither possession nor title, but was, nevertheless, secure by reason of his privilege or *jus in re*, which the law would enforce against the *res* by seizure: *The Young Mechanic*, 2 Curtis 405.

The principle, thus established, rapidly found its way to public favor, and tacit liens were created in a numerous class of cases, amongst which may be enumerated—liens in favor of the public treasurer on all of the property of persons indebted to the government; in favor of a landlord as against the fruit belonging to his tenant; in favor of the owner of a shop for his rent, as against the goods belonging to his tenant; in favor of the lenders of money for repairs on a house or on a ship, and lastly, in favor of mechanics generally for repairs to property whether movable or immovable: Mackenzie's *Studies in Roman Law*, before cited.

This system of hypothecation manifestly rests on considerations entirely foreign to those which led to the inception of the lien accorded by the maritime law, it has no necessary connection with the wants of commerce, and it extends no special protection to those who furnish necessities to ships. In principle it is much more analogous to the lien of an unpaid vendor, or to the mechanic's lien acts of our own time, than to a pure maritime lien. The system has been useful in supplying protection to a class who needed it, and by the general maritime law the advantages of the lien are given to material-men in general, but in the maritime law of the United States it has only been adopted in favor of material-men when dealing with a vessel at a foreign port, and has been rejected when the vessel is at her home port: *The Lottawana*, 21 Wall. 558. The considerations which govern the latter class of contracts will be considered subsequently.

¹ The derivation of the word is evidently from the Greek, and though there is reason to believe that contracts of this character were known to the Greeks, they did not exist amongst the Romans until a comparatively later period: Schouler on *Bailments* 161; Addison on *Cont.* 1019.

The designation material-men and the why and the wherefore of the lien is thus pithily explained by Sir Leoline Jenkins: "These are material-men," says he, "whose trade it is to repair or equip ships, or to furnish them with tackle, provisions or necessities of any kind. These men, when they have furnished any victuals or materials upon the credit of the ship, are certain losers if they are prohibited from proceeding against her; if they be put to their personal action against the master they will find, in general, that he is not worth a fortieth part of that which he has taken upon the credit of the ship:" *Life of Sir Leoline Jenkins*, vol. 2, pp. 746, 747.

The term is one of very wide applicability; it embraces the lumber-man, or iron-factor, or smith who furnishes her the wood or metal requisite for her repairs.¹ The machinist, or sail, or spar-master who repairs her motive power, the artisan who ornaments and preserves her with paints and oils, the ropemaker who furnishes her anew with cordage, as well as the ship-chandler who supplies her with the various "necessaries" for the voyage.

It is sometimes a matter of some difficulty to determine whether the articles were furnished to a vessel already in existence, or whether they were furnished in part to bring her into existence; in the former event the contract is maritime. But the fact that the work was done after the vessel was launched does not, *per se*, render the contract maritime, nor is she necessarily a ship because she has made a voyage to a neighboring port, if she be towed there before she has received her motive power, and for the purpose of being supplied therewith on her arrival; nor does it matter in such a case that she had cargo on board, if the taking of such cargo be a mere incident of the undertaking: *The Isasco*, 1 Brown's Rep. 495. But see *contra*, *The Eliza Ladd*, Deady's Rep. 519.

Money advanced to pay for supplies or repairs constitutes the advancer a lien-holder, he is subrogated to the mechanic or ship-chandler who actually supplies them: *Davis v. Child*, Davis Rep. 71; *Thomas v. Osborn*, 19 How. 29. But the lender of money has only a lien when the advance is made to pay a debt

¹ But not if supplied for her construction, because a contract to build a ship, or to furnish articles for her construction, is not maritime: *Peoples' Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 Id. 129; *Young v. The Ship Orpheus*, 2 Clifford 29.

which is a lien.¹ The lien depends upon the declared object and purpose of the supply, and if the advance be thus made in good faith, the lender is not called upon to see to the application of the fund, nor is his lien divested by reason of any subsequent misapplication of it by the borrower: *The Ship Fortitude*, 3 Sumn. 228; *The Royal Stuart*, 2 Spink's Rep. 258; *The Nelson*, 1 Haggard's Rep. 169; *The Grapeshot*, 9 Wall. 141. The advancer will be required to file an exhibit, containing the various items for which the money has been advanced, together with such further proof as may be necessary in order to enable the court to judge of the necessity of the advance and of the application of the fund. It is not, however, the policy of a commercial court to scrutinize the account item by item with undue strictness, and they will allow for moneys advanced for purposes which would not, *per se*, make the furnisher a lien-claimant, provided that such payments were equally necessary: *Crawford v. The Wm. Penn*, 3 Wash. C. C. R. 484; *The Brig Bridgewater*, Olcott's Rep. 35; *The Emily B. Souder*, 17 Wall. 666; *The Rigi*, Law Rep., 3 Eccl. & Ad. 516; *The Tangier*, 2 Lowell's Dec. 7; *The Bark J. F. Spencer*, 5 Benedict 151; *The Sarah Harris*, 7 Id. 28 and 177.

The creditor, of course, must prove that he acted in good faith, or, in other words, that he believed in the existence of the necessity.² And under such circumstances, the necessity may be presumed, if the contract be made with the master, on the credit of the ship: *The Grapeshot*, *supra*. The presumption of law is that the credit of the vessel is an element in the contract, and this presumption is not rebutted by proving that the credit of the owner

¹ Hence, if a vessel be attached in consequence of a common-law action against her owners, money advanced to pay such a debt, and thus effect her discharge, confers no lien: *The A. R. Dunlap*, 1 Lowell's Dec. 350. But though the debt must be one growing out of a maritime contract, or maritime service, it is no longer true that the signification is so limited as to include only that which is physically annexed to the ship, such as repairs made to her, but will include towage, pilotage, custom-house dues, consular fees, charges for medical attendance to the crew: *The George T. Kemp*, 2 Lowell's Dec. 478; *The Emily B. Souder*, 17 Wall. 666; *The Riga*, Law Rep., 3 Eccl. & Ad. 516.

² The advancer acting in good faith will not be called upon to prove actual necessity—apparent necessity is sufficient under such circumstances: *The Fortitude*, 3 Sumn. 228; *The Grapeshot*, 9 Wall. 129.

was good at the time.¹ Of course, it is a valid defence to an asserted lien to aver and prove that the personal credit of the owner, and that only, was pledged; but it is no defence to say that the personal credit of the owner would have been sufficient, when, in fact, it was not relied on: *The A. R. Dunlap*, 1 Lowell's Dec. 350; *The Plymouth Rock*, 23 Int. Rev. Rec. 129.²

Nor does it matter whether the advance be made at the request of the owner, master or other agent acting within the scope of his authority.³ The inquiry of the advance should be to determine the purpose and object of the loan and its apparent necessity, and if these circumstances concur and if it be made upon the credit of the ship, the creditor will be protected.

When the contract is made with an agent instead of with the principal, the creditor must prove that the agent had not, or appeared not to have funds of the owner in hand. Not that the law of lien depends in general upon that of agency, but because in this instance it does, and inasmuch as the master is not a general agent for all purposes, the creditor will not, therefore, be protected when the master is known to be in funds, the maritime law not permitting him in such a case to pledge the property, just as the common law would not permit him to pledge the credit of his principal: *The A. R. Dunlap*, 1 Lowell's Dec. 350; *The Williams*, 1 Brown's Ad. R. 208.⁴

The peculiarities which have attended the enforcement of the liens of material-men in the United States, have led to the promulgation of some doctrines which, it is believed, were never sound on principle and which are no longer authority; prominent amongst these may be mentioned the dicta, "That where the contract is

¹ The text refers to vessels in foreign ports, the peculiarities which distinguish contracts of this character when made in the home port of the vessel will be subsequently considered.

² The mere advance of money without any hypothecation does not, by reason of its subsequent application to the payment of the liens, constitute the advancer a lien holder: *The Canal Boat W. A. Harris*, 8 Benedict 210.

³ A contrary doctrine was promulgated in *The St. Jago de Cuba*, *infra*, but was not necessary for the decision of the case, and has long since been overruled: *The Kalorama*, 10 Wall. 213; *The Guy*, 9 Id. 758; *The Walgrien*, 3 Benedict 394; *The Commonwealth*, 20 Int. Rev. Rec. 64; *The Belle Lee*, 12 Id. 123.

⁴ The master, however, is not the only agent by whom liens can be impressed. One who furnished supplies in good faith, to any agent acting within the usual scope of his employment, will, *prima facie*, have a lien on the vessel for their payment: *The Steamer Metropolis*, 9 Benedict 83; *The City of New York*, 3 Blatch. C. C. R. 187.

made with the owner in person, no lien is implied; that it is only the contracts which the master enters into as master, that specifically bind the vessel:" Conkling's Admiralty 73, 78, 80; *St. Jago de Cuba*, 9 Wheat. 417.

This proposition would seem to imply a necessary connection between lien and agency—a connection which may be important in the contracts of material-men and yet not significant when applicable to liens in general. It is difficult to understand on principle why one who charters a ship or places his goods on board of her for carriage, or who handles her sail or moves her engines, should be denied a lien if the contract be made with the owner and have a lien, if the contract be made with the master.

The presence of the owner may defeat the authority of the master, but even where the contracts of material-men are concerned, it is idle to say that the mere presence of the owner or the fact that the contract was made with him, precludes the possibility of a credit given to the vessel. Nor is it any defence to a valid lien to assert that the personal credit of the owner would have been sufficient, when that in fact was not relied on.¹

Another error equally wide spread has grown out of the peculiar status of the material-men in the admiralty courts of the United States. By the maritime law of this country, the material-man has no maritime lien for supplies furnished or repairs made in the home port. This exception is confined to one class of contracts, viz.: the contracts of material-men; but the exception has been made to swamp the rule and the broad statement is not infrequently made, that though the contract is confessedly maritime, there is no lien implied, because it was made in the home port of the vessel. Here again it is difficult to see how, on reason, principle or authority this dicta can be sustained. All maritime contracts have the same elements, the same tests, and should be adjudicated by the same rules; the mere circumstance that by the maritime code of the United States, the material-man is denied the implied lien which that code affords to maritime contracts in general, can scarcely be construed as warranting the dicta that the rule is, in the home port no lien is implied. On the contrary, it is believed

¹ The earlier cases have been overruled, even where the contracts of material-men are concerned: *The George T. Kemp*, 2 Lowell's Dec., 480; *The Kalorama*, 10 Wall. 204; *The James Guy*, 9 Id. 758; *The Walgrien*, 3 Benedict 394; 11 Blatch. 241.

that, apart from the contracts of material-men, the maritime law of the United States makes no distinction between home ports and foreign ports, and that the residence of the owners, or, in other words, the home port of the vessel is only material when the lien claimant is himself a material-man, or where the claimant stands in his shoes by right of subrogation.¹

The characteristics of the common law and the maritime lien are essentially different. The right of the lien-claimant in the first class is dependent upon possession; he holds as against the owner only. In the latter, however, his rights are independent of possession, and he holds not as against the owner, but as against all the world.

If the lien-holder sells the property by order of a common-law court, the purchaser takes the right, title and interest which the defendant had; but if the sale be made under a decree of the Admiralty Court, the purchaser takes the property discharged of all encumbrances: *The Steamer Raleigh*, 2 Hughes 44. When there is an express hypothecation the assignee may enforce his lien in the admiralty; but whether or not the lien arising from an implied hypothecation is lost by an assignment of the claim must be regarded as unsettled: *The Sarah I. Weed*, 2 Lowell's Dec. 555; *The Champion*, 1 Brown's Ad. Rep. 520. Seamen, in general, have a lien on the ship for their wages, but the master, by our jurisprudence law, has not.² He has a lien on the freight for any advances which he may have made: *Drinkwater v. The Spartan*, 1 Ware's Rep. 149; and so likewise has a part owner if the ship be held as partnership assets; but the rule is otherwise when the owners hold as tenants in common (*The Larch*, 2 Curtis 427), and an agreement "to run a vessel on shares" does not constitute

¹ Seamen have a lien for wages earned in the home port of the vessel: *The Sloop Canton*, 1 Sprague 437. The shippers of goods have a lien for their transportation in safety, though the voyage be confined to the home port of the vessel: *The E. M. McChesney*, 8 Benedict 150; 15 Blatch. 185. The wharfinger has a lien against a vessel for wharfage in the home port: *The Kate Tremaine*, 5 Benedict 60; *Ex parte Easton*, 5 Otto 68. Tug owners have a lien for towage performed in the home port: *The General Cass*, 1 Brown's Ad. 334. Pilots have a lien against domestic vessels irrespective of local law: *The Alice Tainter*, 5 Benedict 391.

² This exception to the general rule is based on the ground of the inconvenience which might result if the master, when his removal were desired, or his wages stopped for misconduct, keep possession of the ship or compel her sacrifice when abroad.

them partners: *Webb v. Peirce*, 1 Curtis 111. The master has a lien on the cargo for demurrage, and this is true even though demurrage be not expressly stipulated for in the bill of lading: *The Hyperion's Cargo*, 2 Lowell's Dec. 93.¹

The lien follows the ship wherever it goes, and may be enforced whenever there is a jurisdiction to enforce it.² It is not divested by a forfeiture of the vessel to the government for breach of municipal law (*St. Jago de Cuba*, 9 Wheat. 409), nor by a sale to a *bona fide* purchaser without notice (*The Bark Chusan*, 2 Story Rep. 456), nor by the death or insolvency of the owner (*The Young Mechanic*, 2 Curtis Rep. 404.)

The lien of course may be waived by act of the parties or it may be lost by laches. The making of an express contract is not, however, in itself, any waiver of the lien: *Peyroux v. Howard*, 7 Pet. 324; *The Bird of Paradise*, 5 Wall. 545. Nor is the mere taking of a note for the debt, unless it can be shown that the contract was to accept the lesser security for the greater: *Leland v. The Medora*, 2 Wood. & Minot 100. The lien should be enforced within a reasonable time, and if this be not done, it is at the risk of the lien-holder. But when the interests of third parties are not affected, the lien will be enforced, notwithstanding a very considerable time may have elapsed.

The state Statute of Limitations will not in such a case be regarded as a bar: *The D. M. French*, 1 Lowell's Dec. 43; but when the rights of third parties will be affected, or where there is danger of injustice being done, the rule of diligence will be upheld: *The Royal Arch*, Sunbury Rep. 269.

THEODORE M. ETTING.

¹ There is no lien in favor of one who has paid an insurance company the premiums on a policy of insurance on a vessel effected by her owner. The contract in such a case is one for the benefit of the owner; and if the vessel be lost the money is paid to him, not to advancer. But if one make advances on the credit of the vessel, or if one's services have been of such a character as to constitute him a lien-holder, he may insure, and in the event of a loss the money follows the lien: *The John T. Moore*, 3 Wood's Rep. 61.

² It has been held that a citizen of Canada may enforce in our courts a maritime lien for supplies furnished to an American vessel, though no such lien could have been enforced in the place at which the contract was made or supplies furnished: *The Champion*, 1 Brown's Ad. Rep. 520.

Philadelphia.

(To be continued.)

RECENT ENGLISH DECISIONS.

Court of Appeal.

RAYNER v. PRESTON.

After the date of a contract for the sale of a house, and before completion of the purchase, the house was damaged by fire, and the vendors received the insurance money from the insurance company under a policy existing at the date of the contract. The contract contained no reference to the insurance. In an action by the purchasers against the vendors: *Held*, per COTTON and BRETT, L.JJ. (*dissentiente* JAMES, L. J.), that the purchasers were not entitled to recover the moneys from the vendors, or to be allowed to have the amount deducted from their purchase-money, or to have the moneys applied to reinstatement of the premises.

Per JAMES, L. J. The purchasers were entitled to succeed in their action, on the ground that the relation between the vendors and purchasers became and was, in law, as from the date of the contract, and up to the completion of it, the relation of trustees and *cestui que trusts*, and that the trustees received the insurance money by reason of and as the actual amount of the damage done to the trust property.

Judgment of JESSEL, M. R., 43 L. T. Rep., N. S. 18, affirmed.

ON the 31st of July 1878, the plaintiffs entered into a contract with the defendants for the purchase of a house in Liverpool for the sum of 3100*l*. The house at the time was insured against fire by the defendants with the Liverpool and Globe Insurance Company, but the contract contained no reference to this insurance.

Soon after the date of the contract, and before the completion of the purchase, the house was damaged by fire to the extent of 300*l*., which sum was paid to the defendants by the insurance company, who were not then aware of the contract for sale.

The vendors (who were trustees under a will), refused either to hand over the money to the purchasers or to expend it in reinstating the premises, and the purchasers then brought this action.

JESSEL, M. R., considering himself bound by authority, held, that in the absence of express provision in the contract, the purchasers were not entitled, as against the vendors, to the benefit of the insurance money, either by way of abatement of the purchase-money or in reinstatement of the premises. (43 L. T. Rep. N. S. 18), and plaintiff appealed.

COTTON, L. J.—It was contended by the appellants that they were entitled to the moneys, 1, on general principles, irrespective of any special circumstances alleged to exist in this case; 2, under the provisions of the Act of 14 George III., ch. 78, either alone or with the aid of the special circumstances of this case. On the

first point, it was urged that, although the contract did not mention the policy, it gave the plaintiffs, as purchasers, a right to all contracts, to the benefit of which the vendors were entitled, and of which the execution would be beneficial to or improve the thing purchased. This was inconsistent with one of the conditions on the back of the policy, which stipulated that assigns of the property, with certain exceptions (not including a purchaser), should not be entitled to the benefit of the insurance. But, independently of that objection, I am of opinion that the contention of the appellants cannot prevail. The contract passes all things belonging to the vendor appurtenant to, or necessarily connected with, the use and enjoyment of the property mentioned in the contract, but not, in my opinion, a collateral contract, and such, in my opinion at least, independently of the Act of George III., the policy of insurance is. It is not a contract limiting or affecting the interest of the vendors in the property sold, or affecting their right to enforce the contract for sale. For it is conceded that, if there were no insurance and the buildings sold were burnt, the contract for sale would be enforced. It is not even a contract in the event of a fire to repair the building, but a contract, in that event, to pay the vendor a sum of money which, if received by him, he may apply in any way he thinks fit. It is a contract not to repair the damage to the building, but to pay a sum, not exceeding the sum insured, as the money value of the injury. In my opinion, the contract of insurance is not of such a nature as to pass, without apt words, under a contract for sale of the thing insured. But the appellants' case was put in another way. It was said that a vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being invested in him, he could not have recovered on the policy, he must be considered as a trustee of the money recovered. I think that this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a court of equity will give effect to by transferring the property sold to the purchaser, and, so far as he is a trustee, he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no sense a trustee for the purchaser of rents accruing before the time fixed for completion, and here the fire

occurred, and the right to recover the money accrued before the day fixed for the completion. The argument that the money is received in respect of property which is trust property, is, in my opinion, fallacious. The money is received by virtue or in respect of the contract of insurance, and though the fact that the insured had parted with all interest in the property insured would be an answer to the claim, on the principle that the contract is one of indemnity only, this is very different from the proposition that the money is received by reason of his legal interest in the property.

It remains to be considered whether the statute of 14 Geo. III., ch. 78, can give the plaintiffs any right to the money. In my opinion the statute does not, of itself, so connect the money with the land sold as to entitle the plaintiffs successfully to contend that, under the contract, they are entitled to the money.¹ * * *

BRETT, L. J., delivered a concurring opinion.

JAMES, L. J.—I am unable to concur in affirming the judgment of the Master of the Rolls. According to my view of the case, the plaintiffs' contention is founded, not only on what I may call the natural equity which commends itself to the general sense of the lay world not instructed in legal principles, but also on the artificial equity as it is understood and administered in our system of jurisprudence. I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust*. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract, while the contract is *in fieri*, the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is a thing ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that, while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that is, in

¹ The rest of the opinion being upon the statute, is omitted as not of general interest.

my opinion, the correct definition of a trust estate. Whenever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust. The legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*. This being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee, any benefit which accrues to a trustee from whatever source or under whatever circumstances, by reason of his legal ownership of the property, that right and that benefit he takes as trustee for the beneficial owner. If the policy of insurance in this case were a collateral contract, such as the policy which a creditor effects on the life of his debtor, the case would be wholly different. But a policy of fire insurance is not, in my opinion, a collateral contract; it is not a wagering contract—a contract that if a fire happened, then a certain sum of money shall be paid to the insurer—but it is, in terms and in effect, a contract that, if the property is injured, the insurance company will make good the actual damage sustained by the property. That damage, and that damage only, gives the right, and is the measure of the right, and it seems to me impossible to say that it is not, by reason of the legal ownership, and in respect solely of the injury done to that legal ownership, that the right to recover from the insurance company accrued to the insurer. If the fire in this case had happened through the wrongful or negligent act of a third person, while the contract was *in fieri*, the legal right to sue for the damage would be in the vendor; but on the completion of the contract the purchaser would be entitled to use the name of the vendor as his trustee, to sue for the damage so sustained; or, if the damages had actually been recovered in the interval, to recover the damages from the vendor. And it appears to me that there is no distinction in principle between this right and the right of the purchaser to use the vendor's name in an action on the contract of indemnity against loss by fire, which the policy of insurance is. It is not, in my view of the case, at all material to consider what would be the case if, after actual conveyance and during the currency of the policy, a fire had occurred. The vendor in that case would have no right, as between him and the insurance office, and the purchaser would have no right of action, because one of the conditions of the policy excludes it, and, independently

of that condition the policy would or might, probably, be held not to run with the land in the hands of the subsequent owner. And in that case there would not be that which is the foundation of the right, the legal ownership and right in one person and equitable ownership in another. No doubt it is a mere accident that there was such a policy, and there was such a right. The purchasers could not have complained if there had been no insurance. But that has occurred in a great variety of cases in which equitable rights have arisen. Where there are a creditor, a debtor and a surety, and the surety finds out that, by something to which he is not privy and of which he had never heard, somebody else had become surety, or the creditor had obtained security, the surety has a right to obtain contribution from such surety, or to obtain such security as the case may be, and the creditor releasing such surety or parting with such security, would probably find himself in considerable peril. In the same city in which this controversy has arisen, there occurred some time ago a great destruction of property by reason of an explosion of gunpowder caused by a fire. Houses were damaged, not by fire, but by the explosion caused by a fire in another neighboring place. The insurance office thought that it was for their interest to be very liberal, and, treat the damage from the explosion as a damage from fire within the policies, and to pay accordingly. This was a mere act of liberality. They thought it was for their permanent benefit, commercially, to be liberal, and they were liberal accordingly : *Taunton v. Royal Ins. Co.*, 2 Hem. & Mil. 135. I cannot myself doubt that, if a trustee or a vendor who had become trustee by the completion of his contract had received the bounty, he would have received it by reason of his trusteeship, and would have had to give it up to his *cestui que trust* and purchaser. In my view of the case, it is perhaps unnecessary to refer to the Act of Parliament as to fire insurance ; but the act seems to me to show that a policy of insurance on a house was considered by the legislature, as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser, having an equitable interest under a contract of sale, is a person having an interest in the house within the meaning of the act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a

tenant for life, having insured his house, has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by showing that he was of extreme old age, or suffering from a mortal disease. In the case of *Collingridge v. Royal Exchange Assurance Corporation*, L. R., 3 Q. B. Div. 173, the vendor recovered the whole amount of the loss, although it was absolutely certain, having regard to the solvency of his purchaser, that he would really never suffer any loss at all, personally or otherwise than as trustee for such purchaser. Of authority on the subject there is, no doubt, the express decision of KINDERSLEY, V. C., against the plaintiff; but against that there are to be set off the very distinct opinions of Lord ST. LEONARDS and PARKER, V. C., men of great knowledge of equity, and of great accuracy and sense in their dicta. But I prefer to rest my judgment on the fact that the relation between the vendor and purchaser became, and was in law, as from the date of the contract, and up to the completion of it, the relation of trustee and *cestui que trust*, and that the trustee received the insurance money by reason of, and as the actual amount of the damage done to the trust property. The plaintiffs put their case also on the ground of the representations made to them by the defendants' solicitor and agent. What took place appears to me to be this: The solicitor said to the purchasers, "I do not know who is entitled, but the vendors are the only persons who have a legal claim, and I will make the claim accordingly, whichever is entitled," and the purchaser left the matter in his hands. Now the purchasers could, at that time, have applied to the office to compel the money to be laid out in restoring the building. And I am of opinion that, when the money was, under these circumstances, obtained from the office, it reached the vendors' hands, according to the then rights of the parties, as between them and the insurance office; that is to say, as money which ought to be laid out in reinstating the premises, or, in other words, as money which the purchasers alone had any real and substantial interest in.

Upon the first blush this decision seems scarcely consistent with equity, but the particular facts of the case disclose grounds for a decision which, apart from general principles, give a special complexion to the case itself. For in-

stance, one of the conditions endorsed on the policy stipulated that assigns of the policy, with certain exceptions (not including a purchaser), should not be entitled to the benefit of the insurance. The policy of insurance was, as was

said by COTTON, L. J., a collateral contract. It was a contract, not to repair the damage to the building, but to pay a sum not exceeding the sum insured, as the money value of the injury.

But is not the vendor, in the interim between the making of the contract and its completion by a conveyance, a trustee of the property for the purchaser? Lord Justice COTTON thinks not, an unpaid vendor being a trustee in a qualified sense only, i. e., only in respect of the property contracted to be sold. Of this the policy is not a part.

The money, be it observed, is received by virtue of the contract of insurance, and though the fact that the insured had parted with all interest in the property insured would be an answer to the claim, on the principle that the contract is one of indemnity only, this, as the Lord Justice says, is very different from the proposition that the money is received by reason of his legal interest in the property. In the case of *Garden v. Ingram*, 23 L. J. Ch. 478, relied on by the appellants, Lord ST. LEONARDS (Chancellor), affirming a decree of KNIGHT BRUCE, V. C., declared that the purchaser from a mortgagee of a lease was entitled to the benefit of a policy of insurance effected in pursuance of a covenant contained in the lease in the joint names of the lessor and lessee, and ordered the defendant, the lessee, to concur with the landlord in giving a receipt for the money. But there the lease contained a provision that any money recovered on the policy should be laid out in reinstating the buildings injured by fire. Upon this ground the decision was based; and this is the view of the case expressed by KINDERSLEY, V. C., in *Lees v. Whiteley*, 35 L. J. Ch. 412. See Law Rep., 2 Eq. 143; 35 L. J. Ch. 412; 14 W. R. 534; *Lagrange v. U. M. Ins. Co.*, 14 L. T. (N. S.) 472, V. C. K. This is manifestly very different from the state of facts disclosed in the case before us, there being in

Garden v. Ingram, *supra*, an express covenant or provision in the subject-matter of sale relating to the disposition of the money recovered under a policy. *Durant v. Friend*, 5 De G. & Sm. 343, also relied upon by the appellants, was *dictum* only, not a decision, and need not, therefore, be further considered. In *Norris v. Harrison*, 2 Madd. 268, a remainderman received the balance of a fund received by a previous tenant for life, on account of a policy effected by such tenant for life, but he did so because the executor and residuary legatee of the tenant for life had by his will treated the fund as appropriated for the benefit of the remainderman.

Against these there is the direct decision of KINDERSLEY, V. C., in *Boole v. Adams*, 12 W. R. 683; 33 L. J. Ch. 639; 10 L. T. (N. S.) 287. Also, a portion of the judgment of Lord ELDON in *Paine v. Meller*, 6 Ves. 349, quoted by the Master of the Rolls, which to some extent supports the view of the vice-chancellor in the case referred to.

BRETT, L. J., expressed his opinion that the subject-matter of insurance is a different thing from the subject-matter of the contract. The subject-matter of insurance may be a house in a fire policy, or premises in a fire policy; or may be a ship, or goods, or several other things, in a marine policy. But the subject-matter of the contract is money. There was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured, but not with regard to the subject-matter of the contract, which is money, and money only.

Lord Justice BRETT deems it wrong to say that the one is a trustee for the other, for if the vendor were a trustee of the property for the vendee, it would seem to follow that all the product, all the value of the property received by the vendor, from the time of the making of the contract, ought to belong to the

vendee. The Lord Justice thought, with all deference, that that was not law. Therefore, he ventured to doubt whether the one was ever a trustee for the other. They are only parties to a contract of vendor and purchaser, of which the court of equity will, under certain circumstances, decree a specific performance.

But even if the vendor was a trustee for the vendee, the contract of insurance is not a contract which runs with the land. It is a mere personal contract, and unless the contract is assigned there can be no suit or action maintained upon it, except between the original parties to it. At common law, with regard to marine insurances, it has always been held that where there is a policy, and where the subject-matter of the insurance is sold by contract during the running of the policy, no interest under the policy passes unless it is made part of the contract of purchase and sale, so that it would be considered in a court of equity as assigned. In *Powles v. Innes*, 11 M. & W. 10, it was decided that "a person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy, except as trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit."

Such was the opinion of both Lord ABINGER and Lord WENSLEYDALE. And QUAIN, J., in the case of *North of England Pure Oil Cake Co. v. Archangel Maritime Insurance Co.*, Law Rep., 10 Q. B. 249 (1875), lays it down, in accordance with the treatises of Arnold and Phillips, that "on the sale of a thing insured no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly." Such appears to have always been the rule in courts of law; and KINDERSLEY, V. C., seems,

in *Lees v. Whiteley*, *supra*, to lay it down as the well-settled and recognised rule in courts of equity. The action for money had and received was always, as BRETT, L. J., said in the course of his opinion, treated at common law as founded upon equity, and therefore, the decision in this case, whatever it ought to be, would be, in his opinion, the same, whether it should be considered to be a decision at common law or in equity.

In *Hill v. Cumberland, &c., Protection Co.* (1868), 59 Penn. St. 474, the owner of buildings insured them against fire, and afterwards entered into a contract to sell them. Held, that he had an insurable interest in the property, notwithstanding the stipulation in the policy that if the property "be alienated by sale or otherwise," or "transferred by any contract or change of partnership or ownership," the policy should be void. At the time of the loss a portion of the purchase-money remained unpaid, and no conveyance had been made. See also *Washington, &c., Ins. Co. v. Kelly*, 32 Md. 421 (1870), to the same effect.

The vendor in a contract of sale of a factory and machinery, who retains the legal title until payment of the purchase-money, has an insurable interest in the machinery as well as the buildings, and may procure an insurance upon the property itself, and not merely his equitable interest in it: *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421 (1871).

The vendee bears the losses as well as the benefits between the dates of purchase and consummation. *Greaves v. Gamble*, Leg. Gaz. Rep. 1 (Pa., 1869); *Kitts v. Massachusetts Ins. Co.*, 56 Barb. 177 (N. Y., 1867); *Hitchcock v. N. W. Ins. Co.*, 26 N. Y. 68, and *Phelps v. The Gebhard Fire Ins. Co.*, 9 Bosw. 404, are authorities on the subject of transfer of title and assignment of policy, but have little bearing on the present case.

The value of the bargain is not the

measure of damages in an action for breach of contract, but the actual consideration: *Ewing v. Thompson*, 66 Penn. St. 382 (1878). And if moneys, to be returned with interest: *Hertzog v. H.'s Adm'r*, 10 Casey 418; *Dumars v. Miller*, Id. 319; *Graham v. G.'s Ex'rs*, Id. 475.

Thus, the policy of insurance, or the moneys paid upon a policy of insurance pending the completion of a contract for the purchase of the premises insured, form no subject-matter of the contract between vendor and vendee, unless specifically mentioned or clearly implied. The vendor may require the completion of the contract on the part of the vendee, or the vendee may perhaps demand the return of his deposit, with interest, if the premises have, in the interim between the making of the contract and the time fixed for its completion, been destroyed or damaged by fire, and no deed has as yet been executed; unless, indeed, according to Lord Justice BRETT, the vendor is not "a trustee of the property for the vendee" (*supra*); but he cannot demand either their restoration, for such would not be the identical premises bargained for, nor yet the amount of the insurance money, for that would relate to another contract between the vendor and a stranger which had formed no part of the contract between vendor and vendee. Where no deposit has been paid the measure of damages is the expenses and trouble incurred by vendee in endeavoring to procure a title: *Dumars v. Miller*, *supra*; but he cannot, in addition, recover damages for the loss of the bargain: Id.

In the principal case reference is made to 14 Geo. 3, c. 78. Apart from the fact that that act embraces only the metropolitan limits of London, it directs the application of the insurance money by the insurance companies, "upon the request of any person or persons interested in or entitled unto any house or houses, or other buildings

which may hereafter be burnt down, demolished or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons, who shall have insured the same, have been guilty of fraud, or of wilfully setting their house, &c., on fire, to cause the insurance money, as far as the same will go, to be laid out and expended towards rebuilding," &c., "unless sufficient security be given that the insurance money shall be expended as aforesaid;" "or unless the said insurance money shall be within sixty days settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such insurance office."

A consideration of this act was eliminated from the discussion of the case before us because no such notice as that required by the act was given, and no suspicion of fraud or of arson attached to the owners or occupiers thereof. And therefore the act did not apply. Indeed, it is clear that this statute has no reference to a mere executory contract between vendor and vendee, but has for its object the protection of all those having existing interests in or ownerships of the premises, under certain circumstances. So far, therefore, it supports the views taken in the cases before cited.

In conclusion, a court cannot decree a specific performance of an impossibility which accident or the hand of God has effected. It can at most restore to the vendee his deposit-money, with interest. It cannot set up a contract where no contract existed. How far the insurance company would be justified in withholding the money payable on the policy must depend entirely upon the terms of their policy relative to its assignment, the projected change of ownership, and any notices required by them, but can have no bearing upon a contract between vendor and vendee in which the existence of the policy of insurance is neither

expressed or implied, much less itself assigned or conveyed.

The cases before cited on the subject of the measure of damages were instances of parol agreements or contracts for the sale of lands, &c.; and, as the court observed more than once, to acknowledge any other standard of damages would be to place the whole of the land in the state at the mercy of parol contracts. This would be virtually to offer a premium to fraud and perjury, the very mischief which the Statute of Frauds was designed to prevent.

"In England," as was remarked by WOODWARD, J., in *Dumars v. Miller*, *supra*, "a parol contract would not be suable at all;" but, as the same learned judge observed in *Hertzog v. Hertzog*, *supra*, "the 4th section of the British Statute of Frauds, relating to parol contracts for the sale of land, has been omitted in the Pennsylvania statute." The original statute of Charles II. had no force, *proprio vigore*, in the colonies, but each colony adopted or adapted it as in its wisdom it thought fit. If, however, in parol contracts relating to the sale of lands, where such are allowed, the actual consideration alone is the measure of damages, *à fortiori* in the more solemn form of a written contract, as was judicially remarked in the latter case, the value of the bargain is not the measure of such damages but the actual consideration.

✓ The other side of the question yet remains, viz.: What is the measure of damages to which the vendor is entitled, the vendee declining to accept a damaged property, and refusing to complete his purchase? We apprehend the same answer must be given to both parties. As the vendee bears the losses as well as the benefits between the dates of the purchase and consummation (*supra*), the vendor can insist upon completion and the payment of the purchase-money, or may recover damages for the default. The measure of damages, however, is

the actual consideration. See *Ewing v. Tees*, 1 Binn. 450; *Wilson v. Clarke*, 1 W. & S. 554; *Ellet v. Parson*, 2 Id. 418; *Sedam v. Shaffer*, 5 Id. 529; *Hastings v. Eckley*, 8 Barr 197. Also, 1 Smith's Laws 397; Sugden on Vendors and Purchasers, 280, and Chitty on Contracts, vol. i., p. 426 (Am. ed.).

At all events the application of money received by the vendor, under a policy of insurance for damage resulting from fire pending the completion of the contract of sale of such premises, such vendor being the policy holder unconditionally, can form no ingredient in the vendee's claim for damages for breach of even a written contract in which the assignment of such policy is neither expressed nor implied.

As therefore the policy of insurance cannot enter into the question, neither vendor nor vendee can obtain any compensation for any depreciation in the value of the property on the one hand, or the loss of the bargain on the other, where there is no taint of fraud to vitiate the contract. The principle that governs is that of mutuality. The value of the land is not the measure of damages, but the amount of the consideration.

"If under the pressure of heavy damages the party could, in such cases, be deprived of what is called the *locus penitentie*, and on the one hand, be compelled to convey, or on the other to accept of the purchase by having damages against him to the amount of the contract, according as the jury may view the circumstances of the case, the distinction would then be without a difference, and the absence of the 4th section of the statute of Charles a serious inconvenience." 1 Smith's Laws, p. 397.

Numerous English cases have been decided in the same way, where the consideration is executory as well as where it is executed: *Feureau v. Thornhill*, 2 W. Blk. 1078; *Walker v.*

Constable, 1 Bos. & Pul. 306; *Johnson v. Johnson*, 3 Id. 162; *Walker v. Moore*, 10 B. & C. 416; *Jarmain v. Egelstone*, 5 C. & P. 172. "The vendee must pay the consideration although the estate itself be destroyed between the agreement and conveyance; and on the other hand he will be entitled to any benefit which may arise to the estate in the interim: *Sugden V. & P.* 446 (Am. ed.); 2 Pow. Con. 61; *Stent v. Bailis*, 2 P. Wms. 220; *Bacon v. Simpson*, 3 M. & W. 78; *McKechnie v. Sterling*, 48 Barb. 330; *Robb v. Mann*, 11 Penn. St. 300; *Reed v. Lukens*, 44 Id. 200; *Hill v. Cumberland Valley Mutual Protection Co.*, 59 Id. 474. But see *Thompson v. Gould*, 20 Pick. 134, *contra*, and *Blew v. McClelland*, 29 Mo. 304, also *contra*, so far, at least, as the recovery of the consideration was concerned, the destruction having occurred previous to the execution of a deed. The opposite or former doctrine, however, bears the impress and prestige of antiquity. See *Hunter v. Wilson* and *Achison v. Dickson*, vol. 2, of Coll. of Decis., p. 56. At all events there is no authority for the vendee's unconditional claim to the insurance money.

In *Loft v. Dennis*, 1 E. & E. 474, an action for use and occupation, Lord CAMPBELL, C. J., said: "I cannot see why the fact of the landlord having received the insurance money, entitles the tenant to be relieved from his liability for rent, any more than if the landlord had won that amount in a lottery; there is no privity in either case between the defendant and the party from whom the money comes."

This decision had been anticipated in *Leeds v. Chatham*, 1 Sim. 146, where the tenant had covenanted to repair. It was held that a tenant has no equity to compel his landlord to apply insurance moneys received by him on the destruction of the demised buildings in rebuilding, or to restrain the collection of rent until the same are so applied. The court

said: "The plaintiff might have provided in the lease for a suspension of the rent in the case of accident by fire; but not having done so, a court of equity cannot supply that provision which he has omitted to make for himself." The court added, although there was a surplus: "upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do?" These two cases are cited in the argument in *Sheets v. Selden*, 7 Wall. 416-24.

The same doctrine was enunciated in *Bussman v. Ganster*, 72 Penn. St. 285; also in *Magaw v. Lambert*, 3 Penn. St. 444, the court saying: "It was not the rent which was insured, but the premises out of which it issued: and the tenant could not say that the company had paid it for him."

So, by analogy, as between vendor and vendee, it is not the consideration or purchase-money which is insured, but the premises for which the consideration is paid or agreed to be paid, and the vendee could not say that the company had paid it for him.

In *Whitaker v. Hawley*, 25 Kans. 674, however, it has been recently held that, where real and personal property are leased by a single instrument for an amount in gross, and the personalty is a substantial part of the property leased, its destruction, without the fault of the lessee, by fire or otherwise, entitles the lessee to an apportionment of the rent; but the insurance, nevertheless, existed for the benefit of the landlord.

The court also doubts, after a careful consideration, whether what is admitted to be the common-law doctrine, that the lessee is bound for the rent in spite of the destruction of the buildings by fire, is in force in Kansas, but put its decision on other grounds.

In the measure of damages for breach of contract upon sale of goods, the an-

alogies of real estate have been departed from, and the price paid or the consideration money, is not considered conclusive, but the actual value is inquired into: Sedgwick on the Measure of Damages, vol. 1, p. 556.

Upon the whole it appears that even though under special circumstances a court of equity might come to the relief of a vendee so as to enable him to recover his purchase-money, in the event of the destruction of the premises by fire pending the completion of the contract, as for instance, where there has been criminality or gross carelessness on the

part of the vendor, or where he has received the insurance money but failed to apply it towards the restoration of the premises, the vendee cannot insist upon such application of the insurance money, which, in point of fact, would be to increase the value of his bargain by substituting newly built premises for old and perhaps dilapidated ones, unless such has formed a part of the original contract. Where the contract is executed and not merely executory, as in the case before us, there is no room for any relief even by a court of equity.

HUGH WEIGHTMAN.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

THE MAHONEY MINING COMPANY, PLAINTIFF IN ERROR, v. THE ANGLO-CALIFORNIAN BANK (LIMITED).

Where a mining company, by its charter, had power to raise money for use in its corporate business, and in the ordinary course of its business drew money from its bank account upon checks of the president and secretary which were an overdraft on its account, the presumption will be indulged that these officers had power to make an overdraft, and that in making it, not only that they did not exceed their authority, but that the moneys thus obtained were paid over to or received by the company.

IN Error to the Circuit Court of the United States, for the District of California.

The plaintiff in error, a mining corporation, was organized under the laws of California in 1873. From that time until the 21st of June 1877, its treasurer was the defendant in error, a banking corporation created under the laws of Great Britain and doing business in the city of San Francisco. During that period the moneys of the mining company were, from time to time, deposited with its treasurer, and were paid out upon checks signed by the president and secretary of the company. In addition, the bank allowed the account of the company to be overdrawn upon like checks. Such overdraft, including proper allowance for interest, amounted, on the 21st of June 1877, to \$6319.59.

On the day last named, at 11 o'clock A. M., in an action then pending in the District Court of the Nineteenth Judicial District of California, in and for the city and county of San Francisco,

wherein certain stockholders of the mining company were plaintiffs, and Ignatz Steinhart, S. Heydenfeldt, P. N. Lilienthal, Otto Esche, F. N. Benjamin, and the mining company, were defendants—which action had been brought to remove those persons from office as directors of the mining company—a decision was announced by the court that the election under which said persons acted as directors was invalid and void, and that they should be ousted and removed. When that decision was announced, the findings of fact by the court, as well as its judgment in conformity with the decision, were reduced to writing and dated of that day. They were, however, not filed with the clerk of the state court until June 22d 1877, upon which day the judgment was recorded by the clerk.

In the afternoon of June 21st 1877, after the announcement by the judge of the state court of his decision, the individuals above named met as a board of directors of the mining company, when its president informed them that the account of the company with the bank, its treasurer, was overdrawn to the amount of \$6319.59, gold coin of the United States, and that the manager of the bank requested either the money or the note of the company. A resolution was thereupon adopted authorizing the president and secretary to execute, and they then did execute, in behalf of the company, a note for \$7500, payable, principal and interest, in coin, to cover as well the amount overdrawn as other anticipated advances. But no such advances were afterwards made.

When the foregoing resolution was passed, the persons participating in its adoption had notice of the decision announced by the state court in manner and form as stated.

The present action was to recover from the company the amount of its overdraft. The complaint contained two paragraphs or counts: one, for \$6351.72 gold coin, on an account, as of June 26th 1877, for money lent by the bank to the company, and for money paid, laid out and expended by the former to and for the use of the latter; the other, for a like amount with interest, being the balance alleged to be due upon the note referred to, after deducting all just offsets, which note, it was averred, was given in consideration of the amount due the bank upon an account stated between the parties on the 21st of June 1877.

The court gave judgment against the company for the amount of the overdraft, with interest at the rate specified in the note; whereupon, the company took the present writ of error.

The opinion of the court was delivered by

HARLAN, J.—We are all of opinion that the bank is entitled to recover the amount of the overdraft as shown by the checks signed by the president and secretary of the mining company.

Upon the board of directors of the mining company was imposed, by the laws of California (Civil Code, sect. 305), the duty of exerting its corporate powers, and of conducting and controlling its business and property. Among the powers which the company had (Civil Code, sect. 354), was the power "to enter into any obligations or contracts, essential to the transaction of its ordinary affairs, or for the purposes for which it was created." Necessarily, therefore, the board had authority not only to designate the banking institution in which the money of the company should be deposited, but to prescribe the mode in which, and the officers by whom, it should be withdrawn, from time to time, for the use of the company. It is equally clear that the board had, as incident to the general powers conferred by law upon the company, power to borrow money for the purposes of the corporation, and to invest certain officers with authority to negotiate loans, to execute notes, and to sign checks drawn against its bank account. And it is settled law that the existence of such authority in subordinate officers may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the board. It may be established by proof of the course of business between the parties themselves; by the usages and practice which the company may have permitted to grow up in its business; and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation. Since checks against the account of the mining company must, in the ordinary course of its banking business, have been signed by some officer or officers designated for that purpose, the bank had the right, in view of the long period during which the checks of that company were signed by its president and secretary—without objection, so far as the record shows, upon the part of the company's board—to assume that those officers had been invested with authority to sign all checks drawn against the company's bank account. So long, therefore, as the mining company had money to its credit on the books of the bank,

the latter, in the absence of notice that the president and secretary of the former had no authority to sign checks, was justified in honoring all checks signed by those officers. This much we do not understand counsel to dispute. Their contention, upon this branch of the case, relates mainly to the liability of the mining company for the amount of any overdraft checks signed by its president and secretary.

Touching that liability, we have to say that since the mining company had power, under its charter, to raise money in that mode, for use in its corporate business, and since an indebtedness thus created would, in the usual course of business, be evidenced by the checks of its president and secretary, the presumption should be indulged, not only that those officers, in making an overdraft, did not exceed their authority, but that the moneys thus obtained were paid over to or received by the company. But that is a mere presumption arising from the conduct of the parties, as well as from the general mode in which corporations organized for profit conduct their business. That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied, in the president and secretary of the mining company to make overdraft checks, and by proof that the company did not receive the money paid thereon by the bank. There is, however, no such proof in this case. The finding is entirely silent as to whether the company did not receive and use the money. And the finding that "no resolution or special authority of the defendant was *shown* authorizing its president and secretary, or either of them, to overdraw its account in bank," fairly interpreted, means nothing more than that no proof was made, either way, on that point. It does not necessarily imply that a resolution to that effect was not, in fact, passed. nor that such special authority was not, in fact, given. The meagre evidence upon which, according to the special finding, the case was tried below, is, we think, insufficient to overturn the presumption which should be indulged in favor as well of the bank as of the integrity and fidelity of the officers of the mining company.

This conclusion renders it unnecessary to consider any other question in the case. The judgment is affirmed.

Authority in an officer or agent of a corporation to do certain things on its behalf, or perform them in a manner different from that prescribed by its charter or by-laws, may be implied from evidence of an habitual usage or course

of dealing notorious to the company, on the part of the officer or agent, in accordance with which he did the act in question.

Thus, in the following instances, classified according to the nature of the act:—

1. **NOTES, BILLS, &c.** The company has been held liable upon notes issued by its treasurer: *In re Great Western Telegraph Co.*, 5 Biss. 363, or by its agent: *Buitt v. Culbertson*, 6 Ga. 166; upon a bill of exchange signed by the president only, and not, as required by the charter, countersigned by the secretary: *Witte v. Derby Fishing Co.*, 2 Conn. 260; upon a bill of exchange signed only by the cashier and not countersigned by the comptroller: *Safford v. Wyckoff*, 4 Hill. 442; upon a certificate of deposit signed only by the cashier, instead of by the president, vice-president and cashier: *Barnes v. Ontario Bank*, 19 N. Y. 152; upon an unsealed obligation for borrowed money where the company's charter authorized it only to "borrow money and issue their bonds therefor:" *McCullough v. Talledega Ins. Co.*, 46 Ala. 376; and see *Jones v. Trustees*, 46 Id. 626; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 471; upon the cashier's endorsement of a bill of exchange, although the charter declared the bank should be liable upon no contract or obligation whatever not signed by the president and countersigned by the cashier: *Merchants' Bank v. Central Bank*, 1 Ga. 418; upon a draft drawn by the president in the absence of the cashier, although a temporary cashier was acting: *Neiffer v. Bank*, 1 Head. 162; and see *Pulmer v. Yates*, 3 Sandf. 137; upon a check certified by a teller: *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125; *Cooke v. State Bank*, 52 N. Y. 96; s. c. 50 Barb. 592; *Clarke National Bank v. Bank of Albion*, 52 Id. 592; *Girard Bank v. Bank of Penn Tsp.*, 39 Penn. St. 92; *Willets v. Phoenix Bank*, 2

Duer 121; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Merchants' Bank v. State Bank*, 10 Wall. 604; *contra*, see *Mussey v. Eagle Bank*, 9 Metc. 306, deciding that a bank is not liable upon the teller's certification of a check, although it be shown that there was a usage for the teller to certify checks as "good;" and *U. S. v. Fleckner*, 8 Mart. (La.) 141, 309, holding that the endorsement by its cashier, of a note belonging to a bank, is insufficient to transfer the note unless the act of the cashier was authorized; and that authority cannot be established by showing that it is the common usage of all the banks in the city to transfer their notes and bills by the cashier's endorsement.

2. **INSURANCE CONTRACTS.** A corporation has been held liable upon a policy of insurance countersigned by the president's assistant instead of the secretary: *Bulkley v. Derby Fishing Co.*, 2 Conn. 252; upon a policy signed by an agent instead of the president or vice-president and secretary: *City of Davenport v. Peoria Ins. Co.*, 17 Iowa 276; upon a verbal agreement to insure made by the president only: *Commercial, &c., Ins. Co. v. Union, &c., Ins. Co.*, 19 How. 318; upon an agreement as to removal of property signed by an agent only and not by the president and secretary: *New England Fire Ins. Co. v. Schettler*, 38 Ill. 166.

3. **MONEY.** A corporation has been obliged to pay money borrowed for it by its secretary: *Beers v. Phoenix, &c., Co.*, 14 Barb. 356; and by an agent: *Allen v. Citizens' Steam Nav. Co.*, 22 Cal. 28.

4. **GOODS.** For goods supplied upon the orders of a chairman, deputy chairman and secretary: *Smith v. Hull Glass Co.*, 11 C. B. 897.

5. **SERVICES.** It has been held liable upon a contract for services made by less than the number of directors legally required: *Bradstreet v. Bank of Royalton*, 42 Vt. 128; upon a contract to pay

commissions made by directors who individually agreed to it in writing at different times, instead of acting simultaneously as a board: *In re Bonellis Tel. Co.*, L. R., 12 Eq. 246; see *Edgerly v. Emerson*, 23 N. H. 555; and upon the vice-president's contract for services: *Shimmel v. Erie Railway Co.*, 5 Daly 396.

6. TRANSFERS OF STOCK. Usage has been decided to render binding upon the company a transfer of stock, although the officers making the transfer dispensed with seven days' notice thereof required by the charter to precede the transfer: *Re Royal British*, 26 L. J. Ch. 545; and see *Chambersburg Ins. Co. v. Smith*, 11 Penn. St. 120; *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Union M. Co. v. Rocky M. National Bank*, 2 Col. 248; and also *Stamford Bank v. Ferris*, 17 Conn. 259; *Fairfield v. Adams*, 16 Pick. 381; *New England, &c., Ins. Co. v. Chandler*, 16 Mass. 275.

Usage may authorize the transfer of stock certificates by endorsement in blank: *Kortright v. Commercial, &c., Bank*, 20 Wend. 91; 22 Id. 348, and it may validate notices to stockholders which are published in newspapers instead of being personally served: *Hall v. United States Ins. Co.*, 5 Gill (Md.) 484; and if it is the usage of a bank not to permit stock to be transferred while the holder is indebted to the bank, a stockholder who becomes its debtor knowing such usage is bound by it, and neither he nor his assignees with notice of the usage can maintain an action for a refusal to permit a transfer of his stock before the debt of the stockholder is paid. The effect of the usage in this case is to give the bank a lien upon the stock for its holder's debt. "The bank had an undoubted right to say to any stockholder: 'We discount your note, but remember until it is paid we shall hold your stock in security; you shall not be permitted to transfer it until you pay us.' There is nothing unfair in this.

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The terms are known and accepted, as between the parties to the present agreement, the stockholder and the bank. This amounts to an hypothecation, a pledge of stock. How it would have been in controversy between a *bona fide* purchaser for valuable consideration and without notice, who pays his money to the stockholder on the faith of the certificate, intrusted with the symbol of the property, the constructive legal possession, the title deed, on its face an instrument transferable and assignable, I do not give any opinion. It is a very different question. But as between these parties, call this answer of the bank what you please, lien, set-off, legal or equitable pledge, retainer, stoppage, course of dealing, general understanding, usage, contract express or implied, it is a bar in law and equity to this action." Per DUNCAN, J., in *Morgan v. Bank of North America*, 8 S. & R. (Pa.) 73.

7. PAYMENT TO BANK CLERK NOT AUTHORIZED TO RECEIVE. In *Manhattan Co. v. Lydig*, 4 John. 377, A., instead of delivering his money to the receiving-teller of the bank, handed it from time to time to a book-keeper of the bank, who was also employed to keep A.'s books, to carry and deposit it in the bank for A. The book-keeper kept part of the money and A. sought to hold the bank for it. The court decided the book-keeper to have been A.'s agent in receiving the money, and that A. must stand the loss.

In *Thatcher v. Bank*, 5 Sandf. 121, the plaintiff had no account with the bank, but having an obligation about to become payable at the bank, left money to meet it with the paying-teller, who failed to pay the obligation upon maturity, and plaintiff sought to recover damages from the bank therefor. It was shown that the paying-teller had no authority to receive money for the bank, and that when he did receive money from persons having no account with the bank

with which to pay their maturing obligations, he did it only occasionally, and as a favor; that he sometimes refused, and that when pressed into taking it from them, he kept it separate from the funds of the bank. The cashier knew that the teller did this occasionally, and did not forbid it, but the court declined to infer from this an assent by the bank that the teller should receive money for it; he was decided to be agent of the person who left the money, and the bank was held not liable.

Terrell v. Branch Bank, 12 Ala. 502, decides that a director was not the agent of the bank in receiving a renewal note. And see *Sterling v. Marietta, &c., Co.*, 11 S. & R. 179.

In these cases there was no authority given by the bank to the book-keeper, paying-teller or director to act for the bank in the manner in question. The cases decide that no such authority was, in fact, given, expressly or by implication. But they do not hold that authority could not be implied from usage, if the usage were shown to exist.

Indeed, *DUER, J.*, in *Thatcher v. Bank*, *supra*, said, with reference to a usage authorizing the paying-teller to receive money on behalf of the bank. * * * "We are not to be understood as saying that a bank in a case like the present may not be rendered liable by proper evidence of such a general usage," &c. And see *East, &c., Bank v. Gove*, 57 N. Y. 597.

There does not appear to be any danger to the corporation in allowing its agents authority to be implied from a continued course of dealing known to the company. "If any officer vested with certain powers should in any instance violate them, and attempt illegally to subject the corporation to any obligation, such corporation may instantly on the discovery disavow the act and prevent a repetition; and then as there will be neither law nor usage to sanction the transaction, it will not be binding."

Per SWIFT, C. J., in *Bulkley v. Derby Fishing Co.*, 2 Conn. 252. In this case the opinion was expressed that, unlike the case of a presumption of title, arising from long-continued possession and enjoyment, the usage need not be ancient.

NOTICE.—But where usage is relied upon to show implied authority in a corporate agent, it must also be shown that the company knew of the usage: *Johnson v. Concord Railroad Co.*, 46 N. H. 213; *Dietrich v. Pennsylvania Railroad Co.*, 71 Penn. St. 432. Such knowledge on the part of the company may of course be express or it may be implied from the notoriety of the usage. Thus it has been decided that the open and notorious custom of all the ticket agents and conductors employed by a railroad company to pay out illegal notes in making change to passengers is evidence as to whether the custom was authorized by the company. Judge BLACK said: " * * * Where a conductor pays out an illegal note in change to a passenger, the penalty cannot be recovered from the company without proof that he had the authority of the president, directors and treasurer, or some of them. But is it necessary that this proof should come in any particular form? Will nothing do but a solemn resolution of the directors in full meeting assembled? May it not be inferred from circumstances? Surely it may. In the present case the offer was to prove not only that a large number of small notes was passed upon two persons in the course of a short time, but that it was the open and notorious custom of [as we understand it] all the ticket agents and conductors employed by the defendants to issue notes of a similar character. Now what is the natural presumption from this? May a jury infer that the superior officers of the company knew of the custom and approved it? or must the court, as a matter of law, determine without sub-

mitting it to a jury, that all the conductors and agents were habitually violating the orders of their masters, as well as an act of the legislature? It is for the jury to say what is the natural presumption which arises out of such facts, and there is no rule of policy which requires us to make any legal or fictitious presumption on the subject. I will not say what verdict ought to be given on such evidence, but I am very clear, that no man who is not a juror in the case has the right to decide that the president and directors were ignorant and therefore innocent of a custom which was open, public and notorious." *Commonwealth v. Ohio, &c., Railroad Co.*, 1 Grant Cas. 350.

Aside from the implication from usage of authority in the officer or agent to make the contract in question, a strong reason for holding the company liable in these cases is that it had received the consideration and benefit of the contract, and hence should not be permitted to repudiate it, and thus take advantage of its own wrong. In *Burgate v. Shortridge*, *supra*, Lord St. LEONARDS said: "It does not appear to me that if by a course of action the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn round, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. * * * The way, therefore, in which I propose to put it to your lordships in point of law is this: The question is not whether that irregularity can be considered as unimportant or as being different in equity from what it is in law, but the question simply is, whether, by that continued course of dealing, the directors have not bound

themselves to such an extent that they cannot be heard in a court of justice to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do."

Acceptance and enjoyment of the benefits accruing from the act or contract of its officers or agents, even though such act or contract be clearly *ultra vires* and outside of the charter powers of the company, will estop the company from repudiating such act or contract, and disclaiming responsibility for it: *Zabriskie v. Cleveland, &c., Railroad Co.*, 23 How. 381; *Bissell v. M. S., &c., Railroad Co.*, 22 N. Y. 258; *Parish v. Wheeler*, Id. 494; *Cary v. Cleveland, &c., Railroad Co.*, 29 Barb. 35; *De Groff v. American, &c., Co.*, 21 N. Y. 124; *Argenti v. San Francisco*, 16 Cal. 255; *McClure v. Manchester, &c., Railroad Co.*, 13 Gray 124; *Chapman v. M. R., &c., Co.*, 6 Ohio St. 137; *Hale v. U. Mutual, &c., Co.*, 32 N. H. 297; *Railroad Co. v. Howard*, 7 Wall. 413; *White v. Franklin Bank*, 29 Pick. 181; *Tracy v. Talmage*, 14 N. Y. 162; *Fister v. La Rue*, 15 Barb. 323; *Southern L. Ins. Co. v. Lanier*, 5 Fla. 110; *Gould v. Town of Oneonta*, 3 Hun 401; *Hazlehurst v. Savannah, &c., Railroad Co.*, 43 Ga. 54; *Chicago Building Society v. Crowell*, 65 Ill. 458; *Bradley v. Ballard*, 55 Id. 413; *Bank v. Hammond*, 1 Rich. L. 281; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Potter v. Bank of Ithaca*, 5 Hill. 490; *Suydam v. Morris Canal, &c., Co.*, Id. 491 note; *Sackett's Harbor Bank v. Lewis Co. Bank*, 11 Barb. 213; *Humphrey v. Patrons' Mercantile Association*, 50 Iowa 607.

A fortiori, then, will acceptance and enjoyment of the benefits accruing from the acts or contracts of its officers or agents estop the company from repudiating them where such acts are not *ultra vires* but within the powers of the com-

pany, and only lack some formality or an express authority in the agent to validate them.

And again, convenience and the necessities of business afford good reasons for implying, from usage, authority in an agent to act on behalf of the company in many ways without express authority from superior corporate officials. The necessity of express authority would tend greatly to hinder and delay business transactions entirely legitimate.

When the principal case was decided at the circuit (*Anglo Cal. Bank v. Mahoney Mining Co.*, 5 Sawy. 255), Mr. Justice FIELD sustained the liability of the mining company upon another and, apparently, an equally solid ground, namely: That the corporation, through the directors, had ratified the over-drafts. It will be remembered that a decision of the state court declared these directors to have been illegally elected, and therefore to have no power, as directors, to act for the company. This decision was rendered June 21st 1877, at 11 o'clock A. M., and some of the directors were informed of it. Later on the same day they met and, as a board, they ratified the over-drafts. On the next day, June 22d, the decision of the state court was filed and entered of record. Mr. Justice FIELD held that the decree took effect only from the date of its record, up to which time the directors "were officers *de facto* holding under color of an election, having charge of the affairs of the company, and capable of binding it in

all matters legitimately devolving upon directors of the company." Citing *Baird v. Bank of Washington*, 11 S. & R. 411; *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 21 Penn. St. 131.

"The fact," continued Judge FIELD, "that the directors, or some of them, were informed of the decision announced by the judge of the district court, where the resolution was passed, does not change the efficacy of the resolution as a ratification of the action of the president and secretary in making the over-draft. They knew that the decision was not necessarily final; that it might possibly be changed upon petition of counsel, or upon the judge's own motion. They knew at least that a decision announced was not a decree entered, and they were not required to govern their action as though the one was equally operative as the other upon their position and rights as directors:" *Anglo-Cal. Bank v. Mahoney Mining Co.*, *supra*. And see *Union Mining Co. v. Rockey, &c., Bank*, 2 Cal. 248, a case very similar to the principal case.

Altogether, the decision of the principal case seems to rest upon such solid foundations and to be so clearly right that one is tempted to wonder that the liability of the mining company was ever resisted, and to ask why a court three or four years behind in its business and overburdened with other more important causes, involving far more doubtful questions, should have been asked to pass upon it.

ADELBERT HAMILTON.

Supreme Court of Michigan.

HACKLEY ET AL. v. HEADLEY.

Evidence of a custom is inadmissible where that to which the custom relates has been expressly provided for in the contract in terms different from the custom.

A contract for certain logs provided that they should be measured or scaled in accordance with the standard rules or scale in general use on Muskegon lake and river. *Held*, that the scale in general use at the time the scaling was required to be done, and not that in use at the time of making the contract, was the one intended.

Defendants, being indebted to plaintiff in a considerable amount, took advantage of his financial embarrassment, and refused to pay him unless he would receive in full a less sum than he claimed; and he, being in pressing need of the money, received the sum offered and gave a receipt in full. *Held*, distinguishing *Vyne v. Glenn*, 41 Mich. 112, not to be duress of goods.

ERROR to the Circuit Court of Kent county.

Smith, Nims, Hoyt & Erwin, for plaintiffs in error.

John C. Fitzgerald, for defendant in error.

The opinion of the court was delivered by

COOLEY, J.—Headley sued Hackley & McGordon to recover compensation for cutting, hauling and delivering in the Muskegon river a quantity of logs. The performance of the labor was not disputed, but the parties were not agreed as to the construction of the contract in some important particulars, and the amount to which Headley was entitled depended largely upon the determination of these differences. The defendants also claimed to have had a full and complete settlement with Headley, and produced his receipt in evidence thereof. Headley admitted the receipt, but insisted that it was given by him under duress, and the verdict which he obtained in the circuit court was in accordance with this claim.

1. The questions in dispute respecting the construction of the contract concerned the scaling of the logs. The contract was in writing, and bore date August 20th 1874. Headley agreed thereby to cut on specified lands and deliver in the main Muskegon river the next spring 8,000,000 feet of logs. The logs were to be measured or scaled by a competent person to be selected by Hackley & McGordon, "and in accordance with the standard rules or scales in general use on Muskegon lake and river," and the expense of scaling was to be equally borne by the parties.

The dispute respecting the expense of scaling related only to the board of the scaler. Headley boarded him and claimed to recover one-half what it was worth. Defendants offered evidence that it was customary on the Muskegon river for jobbers to board the scalers at their own expense, but we are of opinion this was inadmissible. If under the contract with the scaler he was to be furnished his board, then the cost of the board was a part of the expense of scaling, and by the express terms of the contract was to be shared by the parties. If that was not the agreement with him, Headley could only look to the scaler himself for his pay.

This is a small matter; but the question what scale was to be the standard is one of considerable importance. The evidence tended to show that at the time the contract was entered into scaling upon the river and lake was in accordance with the "Scribner rule," so called; but that the "Doyle rule" was in general use when the logs were cut and delivered, and Hackley & McGordon had the logs scaled by that. By the new rule the quantity would be so much less than by the one in prior use that the amount Headley would be entitled to receive would be less by some \$2000; and it was earnestly contended on behalf of Headley that the scale intended, as the one in general use, was the one in general use when the contract was entered into. We are of opinion, however, that this is not the proper construction. The contract was for the performance of labor in the future, and as the scaling was to be done by third persons, and presumptively by those who were trained to the business, it would be expected they would perform their duties under such rules and according to such standards as were generally accepted at the time their services were called for. Indeed, such contracts might contemplate performance at times when it would scarcely be expected that scalers would be familiar with scales in use when they were made. It is true the time that was to elapse between the making of this contract and its performance would be but short, but if it had been many years the question of construction would have been the same; and if we could not suppose under such circumstances that the parties contemplated the scalers should govern their measurements by obsolete and perhaps now unknown rules, neither can we here. It is fair to infer that the existing scale was well known to the parties, and that if they intended to be governed by it at a time when it might have ceased to be used, they would have said

so in explicit terms. In the absence of an agreement to that effect, we must suppose they intended their logs to be scaled as the logs of others would be at the place and time of scaling.

2. The question of duress on the part of Hackley & McGordon in obtaining the discharge remains. The paper reads as follows :

“Muskegon, Mich., August 3, 1875.

“Received from Hackley & McGordon their note for four thousand dollars, payable in thirty days, at First National Bank, Grand Rapids, which is in full for all claims of every kind and nature which I have against Hackley & McGordon.

“JOHN HEADLEY.

“Witness: THOMAS HUME.”

Headley's account of the circumstances under which this receipt was given is in substance as follows: On August 3d 1875, he went to Muskegon, the place of business of Hackley & McGordon, from his home in Kent county, for the purpose of collecting the balance which he claimed was due him under the contract. The amount he claimed was upwards of \$6200, estimating the logs by the Scribner scale. He had an interview with Hackley in the morning, who insisted that the estimate should be according to the Doyle scale, and who also claimed that he had made payments to others amounting to some \$1400 which Headley should allow. Headley did not admit these payments, and denied his liability for them if they had been made. Hackley told Headley to come in again in the afternoon, and when he did so Hackley said to him: “My figures show there is 4260 and odd dollars in round numbers your due, and I will just give you \$4000. I will give you our note for \$4000.” To this Headley replied: “I cannot take that; it is not right, and you know it. There is over \$2000 besides that belongs to me, and you know it.” Hackley replied: “That is the best I will do with you.” Headley said: “I cannot take that, Mr. Hackley,” and Hackley replied, “You do the next best thing you are a mind to. You can sue me if you please.” Headley then said: “I cannot afford to sue you, because I have got to have the money, and I cannot wait for it. If I fail to get the money to-day, I shall probably be ruined financially, because I have made no other arrangement to get the money only on this particular matter.” Finally, he took the note and gave the

receipt, because at the time he could do nothing better, and in the belief that he would be financially ruined unless he had immediately the money that was offered him, or paper by means of which the money might be obtained.

If this statement is correct, the defendants not only took a most unjust advantage of Headley, but they obtained a receipt which, to the extent that it assumed to discharge anything not honestly in dispute between the parties and known by them to be owing to Headley beyond the sum received, was without consideration and ineffectual. But was it a receipt obtained by duress? That is the question which the record presents. The circuit judge was of opinion that if the jury believed the statement of Headley they would be justified in finding that duress existed; basing his opinion largely upon the opinion of this court in *Vyne v. Glenn*, 41 Mich. 112.

Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. It is commonly said to be of either the person or the goods of the party. Duress of the person is either by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. It is not pretended that duress of the person existed in this case; it is, if anything, duress of goods, or at least of that nature, and properly enough classed with duress of goods. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession but refuses to surrender them unless the exaction is submitted to.

The leading case involving duress of goods is *Astley v. Reynolds*, 2 Strange 915. The plaintiff had pledged goods for 20*l.*, and when he offered to redeem them, the pawnbroker refused to surrender them unless he was paid 10*l.* for interest. The plaintiff submitted to the exaction, but was held entitled to recover back all that had been unlawfully demanded and taken. "This," say the court, "is a payment by compulsion: the plaintiff might have such an immediate want of his goods that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied, it must be when the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again." The

principle of this case was approved in *Smith v. Bromley*, 2 Doug. 695 n., and also in *Ashmole v. Wainwright*, 2 Q. B. 837. The latter was a suit to recover back excessive charges paid to common carriers who refused until payment was made to deliver the goods for the carriage of which the charges were made. There has never been any doubt but recovery could be had under such circumstances: *Harmony v. Bingham*, 12 N. Y. 99. The case is like it of one having securities in his hands which he refuses to surrender until illegal commissions are paid: *Scholey v. Mumford*, 60 N. Y. 498. So if illegal tolls are demanded, for passing a raft of lumber, and the owner pays them to liberate his raft, he may recover back what he pays: *Chase v. Dwinal*, 7 Me. 134. Other cases in support of the same principle are *Shaw v. Woodcock*, 7 B. & C. 73; *Nelson v. Suddarth*, 1 H. & Munf. 350; *White v. Heylman*, 34 Penn. St. 142; *Sasportas v. Jennings*, 1 Bay 470; *Collins v. Westbury*, 2 Id. 211; *Crawford v. Cato*, 22 Ga. 594.

So one may recover back money which he pays to release his goods from an attachment which is sued out with knowledge on the part of the plaintiff that he has no cause of action: *Chandler v. Sanger*, 114 Mass. 364. See *Spaids v. Barrett*, 57 Ill. 289. Nor is the principle confined to payments made to recover goods: it applies equally as well when money is extorted as a condition to the exercise by the party of any other legal right; for example, when a corporation refuses to suffer a lawful transfer of stock till the exaction is submitted to: *Bates v. Ins. Co.*, 3 Johns. Cas. 238; or a creditor withholds his certificate from a bankrupt: *Smith v. Bromley*, Doug. 695. And the mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it: *Beckwith v. Frisbie*, 32 Vt. 559; *Adams v. Reeves*, 68 N. C. 134; *Briggs v. Lewiston*, 29 Me. 472; *Grim v. School District*, 57 Penn. St. 433; *First Nat. Bank v. Watkins*, 21 Mich. 483.

But where the party threatens nothing which he has not a legal right to perform, there is no duress: *Skeate v. Beale*, 11 Ad. & E. 983; *Preston v. Boston*, 12 Pick. 14. When therefore a judgment-creditor threatens to levy his execution on the debtor's goods, and under fear of the levy the debtor executes and delivers a note for the amount, with sureties, the note cannot be avoided for duress: *Wileox v. Howland*, 23 Pick. 167. Many other

cases might be cited, but it is wholly unnecessary. We have examined all to which our attention has been directed, and none are more favorable to the plaintiff's case than those above referred to. Some of them are much less so: notably *Atlee v. Backhouse*, 3 M. & W. 633; *Hall v. Shultz*, 4 Johns. 240; *Silliman v. United States*, 101 U. S. 465.

In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendant's conduct, but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal doctrine; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need.

The case of *Vyne v. Glenn*, 41 Mich. 112, differs essentially from this. There was not a simple withholding of moneys in that case. The decision was made upon facts found by referees who reported that the settlement upon which the defendant relied was made at Chicago, which was a long distance from plaintiff's home and place of business; that the defendant forced the plaintiff into the settlement against his will, by taking advantage of his pecuniary necessities, by informing plaintiff that he had taken steps to stop the payment of money due to the plaintiff from other parties, and that he had stopped the payment of a part of such moneys; that defendant knew the necessities and financial embarrassments in which the plaintiff was involved, and knew that if he failed to get the money so due to him he would be ruined financially; that

plaintiff consented to such settlement only in order to get the money due to him, as aforesaid, and the payment of which was stopped by defendant, and which he must have to save him from financial ruin. The report, therefore, showed the same financial embarrassment and the same great need of money which it is claimed existed in this case, and the same withholding of moneys lawfully due, but it showed over and above all that, an unlawful interference by defendant between the plaintiff and other debtors, by means of which he had stopped the payment to plaintiff of sums due to him from such other debtors. It was this keeping of other moneys from the plaintiff's hands, and not the refusal by defendant to pay his own debt, which was the ruling fact in that case, and which was equivalent, in our opinion, to duress of goods.

These views render a reversal of the judgment necessary, and the case will be remanded for a new trial with costs to the plaintiff's in error.

The rule laid down by the court in this case, that "duress exists where one by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will," recognizing, as it does, the fact that such duress may exist as well with reference to the goods or legal rights of a party, as to his person, is at once so reasonable and just, that the only wonder is that it has not always been laid down in terms, equally clear and comprehensive.

The rule laid down in the leading case of *Astley v. Reynolds*, 2 Strange 915; s. c., 2 Barnard, K. B. 40, in the year 1731, notwithstanding it was said in *Hull v. Schultz*, 4 Johns. 245, that this case was overruled by *Knibbs v. Hall*, 1 Esp. 84, is believed to be well settled upon reason as well as authority. Besides the cases cited by the court in the principal case, see *Lafayette, &c., R. R. Co. v. Pattison*, 41 Ind. 323; *Bradford v. City of Chicago*, 25 Ill. 411; *Pemberton v. Williams*, 87 Id. 16; *Preston v. Boston*, 12 Pick. 7; *Town of Lionier v. Ackerman*, 46 Ind. 552;

Briggs v. Boyd, 56 N. Y. 289; 1 Story on Contr. (5th ed.) sec. 510, where the cases are collected; *Ewell's Lead. Cases* 785, 786, and the cases there cited.

The principle of *Astley v. Reynolds* is well exemplified in *Pemberton v. Williams, supra*. In that case it was held, that where the assignee of a purchaser of land, who has contracted to sell the land to another who demands to see his deed therefor, is compelled to pay the original vendor more than is due him, in order to get a deed to satisfy his vendee, and the payment is made under protest, it is a fair question of fact for the jury, whether the payment is not involuntary and made under a sort of moral duress; and if so, the excess above the real sum due may be recovered back in assumpsit under the common counts.

Where instead of the payment of money, instrument in writing is given, under the same circumstances in other respects as are held to warrant a recovery of money, a distinction is made by some cases, one class of cases holding such circumstances not to constitute duress, while other cases hold that under

certain circumstances such compulsion may constitute such duress as to avoid the instrument. The case of *Skeate v. Beale*, 11 Ad. & Ell. 983; s. c., Ewell's Lead. Cas. 775, well illustrates this distinction. In this case, Lord DENMAN, C. J., in delivering the judgment of the court, said: "We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal; and with regard to the former, the law is laid down in 2 Inst. 483, and Shepherd's Touchstone, p. 61, and the distinction pointed out between duress of, or menace to, the person and duress of goods. The former is a construing force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy; a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of fairness which the law requires all to exert."

In *Atlee v. Backhouse*, 3 M. & W. 645, where the cases are quite fully collected by counsel, Lord ABINGER, C. B., said: "All the cases that have been cited, if they are examined properly, and without the bias that naturally belongs to counsel who examine them in support of their client's case, will be found to be cases of this nature, when property has been unlawfully seized, or unlawfully detained, for the purpose of enforcing the payment of money that was not due. In all these cases (and there is a great series of them) the party against whom the goods have been wrongfully seized or detained is entitled, after payment of the money, to bring an action for money had and received, to try the right; as in the case of tolls, where a man seizes property for

toll and exacts more than is due, the party is entitled to bring an action for money had and received. * * * In all these cases it will be found that the seizure and detention were for the purpose of exacting money." In the same case (p. 642), PARKE, B., said: "You will find that the old cases which say that duress of goods will avoid the agreement are not law; there may be duress of the person, but not of the goods. It certainly seems to me that this was not a voluntary payment, and that unless there was a consideration for it, the plaintiffs are entitled to recover; but you must show that there was no consideration." Again, on p. 650, he said: "There is no doubt of the proposition laid down by Mr. Erle, that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of these goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of duress, because I think that the law is clear, although there is one case in Viner's Abridgment to the contrary (9 Vin. Abr. 317; *Duress*, B. 3; 1 Roll. Abr. 587; 20 Ass. 14), that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and it is so laid down in Shepherd's Touchstone (p. 61); but the ground is that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress."

The distinction taken in *Skeate v. Beale*, and *Atlee v. Backhouse*, may be considered as settled in England, and has received some support in the United States. See *Hazelrigg v. Donaldson*, 2

Met. (Ky.) 445; also *Jones v. Bridge*, 2 Sweeny 431; *Burr v. Burton*, 18 Ark. 233.

The clear tendency of American authority, however, is against this distinction, and in favor of holding the giving of a written instrument instead of paying the money, when the other requisite circumstances concur, to be an immaterial circumstance. The leading case upon this side of the question is *Sasportas v. Jennings*, 1 Bay (So. Car.) 470; s. c., Ewell's Lead. Cas. 782, decided in 1795, which lays down the rule that duress of goods will avoid a written instrument if either of these essentials is wanting: 1. Ability in the person or persons imposing the duress to make recompense. 2. A prompt and effectual method to compel satisfaction. See also, *Collins v. Westbury*, 2 Bay 211; *Bingham v. Sessions*, 14 Miss. 22; *Nelson v. Suddarth*, 1 Hen. & Munf. 350; *Crawford v. Cato*, 22 Ga. 594; *Miller v. Miller*, 68 Penn. St. 493; *White v. Heylman*, 34 Id. 142; *Spaids v. Barrett*, 57 Ill. 293; *Bennett v. Ford*, 47 Ind. 264; *Modlin v. N. W. Turnpike Co.*, 48 Id. 492; Ewell's Lead. Cases 787.

The general tendency of the American courts seems clearly to be towards a liberal extension of the common-law rules as to what constitutes duress. In the principal case, it is conceded by the court that, assuming the correctness of Headley's statement of the circumstances claimed to constitute duress, "the defendants not only took a most unjust advantage of Headley, but they obtained a receipt which, to the extent that it assumed to discharge anything not honestly in dispute between the parties, and known by them to be owing to Headley beyond the sum received, was without consideration, and ineffectual." Had money passed from the plaintiff to the defendants, instead of a receipt for the amount remitted from the sum justly due, on the authority of *Astley v. Rey-*

nolds and *Pemberton v. Williams*, it would seem that it would have been a question of fact for the jury whether such a payment was not "involuntary, and made under a sort of moral duress;" and, if so, the excess would have been recoverable. Now, in this case, no money passed from the plaintiff to the defendant, but a receipt in full was given; and it would seem to have been a proper question to submit to the jury, on the authority of *Sasportas v. Jennings* and other cases disregarding the distinction between written instruments and payments of money, whether the receipt was not given by the plaintiff "under circumstances which deprived him of the exercise of free will;" and, if it was, that it ought to be regarded as having been given under a species of duress. From the report of the case, though the form in which the question was submitted to the jury is not stated, such appears to have been their finding. If embracing the opportunity afforded by the pecuniary embarrassment of the plaintiff, and withholding the amount due the plaintiff for the mere purpose of compelling a settlement for less than was actually due, was an unlawful act; and if it did in fact deprive the plaintiff of the exercise of his free will, and force him to accept in full satisfaction less than was due him, as appears to have been found by the jury, it is difficult to see why the case does not fall within the definition quoted. If the jury did not find generally that the receipt was given under circumstances which deprived plaintiff of the exercise of free will, there would be great force in the argument that the defendants, not having caused or contributed to the plaintiff's embarrassment, the duress was to be found exclusively in defendants' failure to meet promptly their pecuniary obligations; but, so far as the report of the case shows (though of course the record may disclose facts not appearing in the report which would modify this

statement), this does not appear to have been the finding of the jury, but matter of argument on the part of the court. Doubtless, the finding was that all the circumstances narrated collectively constituted duress. If the definition given by the court is correct, duress is a relative term; and it cannot be said, as matter of law, that any particular compulsion constitutes duress as to all persons, or even as to the same person under all circumstances. What constitutes duress is believed to be a mixed question of law and fact, depending upon the circumstances of the particular case in question, and no good reason is perceived why the pecuniary embarrassments of the plaintiff should not be considered in determining whether he was deprived of the free exercise of his

will, whether that embarrassment was caused by the defendants or not, for the reason that, if thus embarrassed, the free exercise of his will would be more easily overcome. Whether we are right or not in the view we have taken of this question, the case is an important and interesting one, and it is to be regretted that the very able court by whom the judgment was rendered could not have seen its way consistent with the rules of law to remedy what they appear to concede to be an act of injustice. It is, however, possible that, in the view we have taken of this case, we may have illustrated the saying that "hard cases make bad law."

M. D. EWELL.

Chicago.

Supreme Court of Indiana.

JOSEPH UHL ET AL. v. JOHN HARVEY.

The general liability of a person as a partner, who is not so in fact, arises from the fact that he has held himself out as such to the world, or permitted others to do so, and that by reason thereof he is estopped from denying that he is one as against persons who have in good faith dealt with the firm, or with the person so held out as a member of it.

It is an absolute requirement that a retiring partner shall give proper notice of his withdrawal, and failing to do so, from whatever cause, he must suffer the consequences.

It is immaterial whether the failure to give proper notice of retirement is wilful or negligent, or arose from causes enforced and beyond control.

The retiring partner escapes continued liability, not by ceasing to hold himself out as a partner, but by giving affirmative notice of the dissolution or of his withdrawal.

One whose membership in a business partnership has been publicly advertised in the community where the business is prosecuted, owes a duty on retiring to give notice thereof, not merely to the customers who have had actual transactions, but to the public who may be misled into giving future credit, on the supposed responsibility of him who retires.

Appellant's name was signed with his copartners' names to a notice of the formation of a partnership published in a daily newspaper; after the publication had continued some time it was discontinued, but the business of the firm continued. Under such a state of facts, there is no legal presumption that the appel-

lant ceased to be a member of the firm because he failed to keep up a newspaper notice of his connection with such firm.

A party cannot retire from a partnership, and permit the remaining partner to use his name, so as to give the partnership credit, without incurring the liabilities of such partnership entered into after his retirement.

It is a question for the jury whether the party acted in good faith in retiring from such partnership.

It is a question for the jury whether the party seeking to hold a retired partner upon obligations entered into afterward, had notice, or was put upon inquiry, of such retirement.

It is not commendable in pleading to anticipate in the complaint matters of defence and reply thereto.

THIS was an action on four certificates of deposit. The complaint contained two paragraphs relating to each certificate, the first charging that defendant Uhl (appellant) was a partner of the banking firm by which the certificates were issued, and the second charging that he had been a partner, and had continued to allow himself to be held out to the world as such, down to the time of plaintiff's deposit of the money and receipt of the certificates.

M. Winfield and Justice & Owens, for appellant

George E. Ross, for appellee.

The opinion of the court was delivered by

WOODS, J.—It seems to us, the issues in the case and the trial of it might well have been simplified and the ends of justice correspondingly promoted, by the omission from the complaint of the second, fourth, sixth and eighth paragraphs in which it is charged that appellant allowed himself to be held out as a partner. They are drawn upon a mistaken theory. While it is true, under the Code, that the complaint must state the facts constituting the cause of action, this does not mean that a full history of the transaction out of which the action arises must be given. It is not commendable pleading to anticipate in the complaint matters of defence, and reply thereto, as is done in the above-named paragraphs. If the appellee was entitled to judgment against the appellant, it was because the appellant was bound by the contracts sued on as if he made them. There is in the books and cases some confusion in reference to the principle upon which rests the responsibility of a retiring partner: *Pars. on Part.* 411; *Gow on Part.* (3 Am. ed.) 240. In *Cregler v. Durham*, 9 Ind. 375, it is

said: "He was not liable as a contracting party because he was not in fact a member of the firm when the contract was made; hence he was not a party to it. If liable at all, then it must be on the ground that the plaintiff had the right to treat him as a member and give credit to him as such."

Here is a manifest inconsistency. The following is a better statement:

"The general ground of liability of a person as a partner who is not so in fact, is that he has held himself out as such to the world, or permitted others to do so, and that by reason thereof he is estopped from denying that he is one, as against persons who have in good faith dealt with the firm or with the person so held out as a member of it:" *Reber v. C. M. Co.*, 12 Ohio St. 175; *Drennen v. House*, 41 Penn. St. 30; *Sherrod v. Langdon*, 21 Iowa 518; 3 Kent. Com. 66.

And it will not do to say as has sometimes been done, that the estoppel springs from the retiring partner's negligent conduct in forbearing to give notice: *Gow on Part.*, *supra*. The liability continues because of the failure to give the proper notice of retirement, and it is immaterial whether the failure was wilful or negligent, or arose from causes unforeseen and beyond control. If negligence were the test, then in all cases inquiry might have to be made into alleged excuses for the failure. But the rights of a creditor cannot be made to depend on the result of such an inquiry. The only just rule is an absolute requirement that the retiring partner shall give proper notice of his withdrawal, and, failing to do so, from whatever cause, he must suffer the consequences. There is no injustice in this. Better than any other, he knows or may be presumed to know, the risks of continued liability, and if the emergency requires it, he can take the necessary steps to give special notice to any customer, old or new, until adequate general notice can be published.

Returning to the point under consideration, it was enough that the plaintiff should have charged the appellant as a maker of the certificates, as was done in the first, third, fifth and seventh paragraphs of the complaint, and the sworn denial of which presented the whole question of liability, and made admissible all the evidence adduced, whether to show the partnership, the facts concerning the appellant's retirement, and the alleged failure to give notice thereof, or the appellee's knowledge on the subject. But

on the strength of the answers of the jury to interrogatories, showing that the appellant had withdrawn, and was not a member of the firm when the certificates were issued, the court on the appellant's motion gave judgment in his favor upon the last-named paragraphs, and rendered judgment for the appellee upon the other two paragraphs, whose sufficiency must, therefore, be determined as though they alone constituted the complaint.

The substance of the objections made to them is, First. That it may be presumed, for aught that is averred, that from and after January 1st 1874, the appellant, Uhl, ceased to hold himself out as a partner in the business; and that after the lapse of so long a time the appellee, who had not before had any transaction with the firm, had no right to presume on a continuance of his membership, the name of the firm being such as to afford no indication on the subject; and second, that while the plaintiff avers want of knowledge of the retirement of the appellant, he does not deny knowledge that Stanley, Atkinson, Whiteside or Thompson had retired, and that the firm had thereby been dissolved.

These objections are not sound. There is no legal presumption that the appellant ceased to be a member of a firm whose business continued uninterruptedly, because he ceased to keep up a newspaper notice of his connection. Once the public were well informed of the membership of the firm, there was probably no profit in keeping up the notice, and the rule is that the retiring partner escapes continued liability, not by ceasing to hold himself out as a partner, but by giving affirmative notice of the dissolution, or of his withdrawal from the membership of the firm. As to the second point, the parties named are made defendants in the case, and the necessary inference from the allegations made is that they had continued in the partnership, and, in the absence of averment to that effect, there is certainly no presumption that others not named had come into the firm. The paragraphs show the appellant's connection with the firm, and the public advertisement of the fact, prior to January, 1874, the want of publication of notice of his retirement, and that the appellee, who knew of his membership but not of his retirement, gave credit to the firm in the usual course of its business, in the belief that the appellant was a member, and this is enough to entitle the appellee to recover, notwithstanding he had had no previous dealings with the firm during

the time when the appellant was a member. One whose membership in a business partnership has been publicly advertised in the community where the business is prosecuted, owes a duty on retiring to give notice thereof, not merely to the customers who have had actual transactions, but to the public who may be misled into giving future credit on the supposed responsibility of him who retires: Pars. on Part. *411; Collyer on Part., sect. 530

There was no available error in sustaining demurrers to any of the answers, because, as already stated, they contained nothing which was not provable under the sworn general denial. The answers to which the demurrers were overruled, were nothing but special or argumentative denials of matters averred in the complaint, and might well have been stricken out, but being allowed to stand, they closed the issue and neither called for nor admitted of reply. There was, therefore, no error in sustaining a demurrer to replies which on motion might properly have been stricken from the files: *State ex rel. Griswold v. Blair*, 32 Ind. 313.

Exceptions were saved to a number of the instructions given to the jury.

The sixth instruction, after enunciating a rule in general language to which no objection is made, proceeds as follows: "So in this case if the defendant Uhl, by his words or conduct, induced the plaintiff to believe him to be a member of the People's Bank, and the plaintiff upon such representations made the deposits evidenced by the certificates sued on, he is liable as fully as if he were in fact a member, for he negligently left the plaintiff to believe him still a member and to deal with the firm upon that belief, and I state it as the law in this case, that it is not necessary that the defendant, Uhl, personally make such representations; but if the plaintiff deposited his money with said Peoples' Bank, and previous to that time it was a matter of public notoriety that defendant, Uhl, was a member of said firm, and such notoriety originated through him or his copartners, in that case it is his duty to prove that he informed the public of his retirement, and if he has failed to do that, then the public was justified in believing him to be a member."

In this connection it may be stated that the appellant had saved his exception to the refusal of the court to give the following instruction:

"No. 17. If you find that these advertisements were made without the knowledge or consent of Uhl, and he, as soon as he heard of them, caused them to be taken out of the papers, then I charge you as the law that he is not bound by them; no person is bound by the act of another, unless done by his authority, or with his knowledge without objection."

The position of the appellant, in reference to the instruction given, is sufficiently indicated by the terms of that which was refused; and if, as claimed, the jury was in effect instructed or led to suppose that the appellant might be held responsible for acts which he neither did nor authorized another to do, and had no knowledge of being done, we could not hesitate to declare that material error had been committed. But properly construed, with reference to the evidence in the case, it is clear that by the notoriety mentioned as having originated through him or his copartners, reference was had to the acts of himself or copartners while they bore that relation to each other; and the proof being clear and undisputed that the appellant lived in Logansport where the business was conducted, and where he was publicly advertised as a stockholder, and with the other stockholders as personally responsible upon the liabilities of the company, he was clearly responsible for the notoriety so produced, whether he or his partners caused the advertisement to be put into the daily papers where it was published. The evidence went further, however, and showed that the advertisement, a copy of which will be given further along, was kept in the paper after appellant's withdrawal, and until March 1876, or later, when, upon the order of appellant, it was stopped, or his name omitted therefrom; and it is to this fact that the instruction which the court refused to give was intended by the appellant to be addressed. But the instruction was wrong, and was properly refused. It was the unquestioned duty of the appellant to give notice of his retirement immediately upon its occurrence, if not in anticipation of the fact, and this duty certainly includes the corresponding obligation on his part to see to it that the advertisement of the firm which showed his connection should be discontinued. His ignorance, from inattention or from whatever cause, that the publication was continued, could not exonerate him. His position called for affirmative action, the giving of unequivocal notice of his retirement, which implies the duty of withdrawing all contradicting advertisements which were

known, or from the circumstances might be presumed to have been known, to him. As applied to the evidence, therefore, there was no error committed in reference to these instructions.

The tenth instruction given was this :

“ The law requires that, upon one member retiring from a partnership he must give notice of his retirement, and in giving notice of his retirement he must act in good faith. Now, if you find that Joseph Uhl, when he retired from the Peoples' Bank, before that agreed that he would keep his retirement a secret, and he did keep it a secret, then he did not act in good faith in his retirement ; but by his agreement to keep his retirement a secret, he consented that he should continue to be represented as a member while that agreement continued.”

It is true, as counsel contend, that it is not an absolute requirement of the law that notice be given, but only in case the one retiring were known as a partner, and in favor of an old dealer, or a new dealer who knew that he had been a member ; but these are points sufficiently explained by other instructions which were given, and, in view of the evidence, this instruction was entirely proper. If, as there was some evidence tending to show, the appellant, before retiring, agreed to keep the fact secret, and he did afterwards keep it a secret, or withhold notice of the fact from the public, it was a wrongful act which should make him liable to any one thereby misled into dealings with the firm in the belief that he was a member.

The eleventh instruction is as follows :

“ If you find that Joseph Uhl retired in 1874, that he told some parties, before the plaintiff commenced dealing with the firm, that he had retired ; and you also find that to others he represented himself as being a member, that is a fact which you may consider in determining whether or not he acted in good faith in giving notice of his retirement. I also say to you, that it is a matter of fact for you to determine whether or not Mr. Uhl acted in good faith, and whether or not the notice he gave, if you find that he gave any notice at all, is sufficient.”

Counsel insist that it was not an issue in the case nor material to be considered, whether the appellant acted in good faith, and that, therefore, it was not proper to give this instruction. It was, however, a question in the case, whether the appellant was a partner when the certificate was issued. He had been a partner,

and unless he had retired, was yet ; but if he retired in bad faith, endeavoring to leave the concern the credit of his name, and yet to escape liability, then his bad faith defeated his purpose and left him liable in fact as well as in appearance. It is true that the appellee needed not under the issues to prove so strong a case in order to prevail ; but, nevertheless, he had a right to make the attempt, and to have it submitted in that view to the jury.

Among the causes assigned for a new trial, is the alleged error of the court in permitting the introduction of testimony that "it was currently reported in Logansport that Uhl was a member of the firm of Peoples' Bank up to the fall of 1875." The only point made against its introduction, however, is that it was not admissible for the purpose of showing either the existence of the partnership or the appellant's connection therewith.

In this position counsel are unquestionably right : *Earl v. Hurd*, 5 Blackf. 248 ; *Cregler v. Durham*, 9 Ind. 385 ; *Macy v. Combs*, 15 Id. 469 ; *Brown v. Crandall*, 11 Conn. 92 ; *Halliday v. McDougall*, 20 Wend. 80. But aside from the instructions of the court, which limited the application of this testimony to the subject of notice of the partnership and of the appellant's retirement therefrom, to which it was clearly relevant and competent, the jury found in answer to an interrogatory that the appellant was not a partner after April 1874, and so it is clear that the evidence did not harm the appellant in that respect.

The advertisement already referred to, and which was shown to have been published in the *Daily Star* while the appellant was a partner, and after his retirement, was of the tenor following :

"People's Bank Stockholders : Josephus Atkinson, Joseph Uhl, William H. Whiteside, George Strecker, William H. Standley, E. R. Thompson of Delaware, Ohio. Doing general banking business. Organized under the laws of the state, making every stockholder individually responsible for all liabilities."

And in reference to this the appellant requested the following instruction, and others involving the same idea, which were refused :

"No. 15. The plaintiff has introduced in evidence an advertisement in the *Logansport Daily Star*. The legal construction of those advertisements is for the court and not for the jury. Those advertisements do not give public notice of the existence of a partnership known as 'Peoples' Bank.' But the legal effect of them would be to advise the public that there was a corporation organized, pursuant to law, in which Uhl is a stockholder. The plain-

tiff had no right to rely upon such notice to give credit to Uhl as a member of a firm known as 'Peoples' Bank,' and if you find from the evidence that the only notice the plaintiff had when he commenced dealing with the bank was by those advertisements, and that Uhl at that time had retired from the firm, the court charges you that the plaintiff had no right to rely upon the same as a public notice of his being a member of the firm."

"We insist," says counsel, "that the evidence was incompetent. The plaintiff did not show that Uhl ever authorized the publication, or that he ever had any notice of it; therefore it was not competent. It did not tend to prove a partnership, or that Uhl was a partner. Both of these objections were pointed out."

As we have already said in substance, there was evidence not only to warrant, but such as required the conclusion, that the appellant was responsible for the advertisement from the time its publication began until it was suppressed upon his order, and even for its continued influence thereafter, because of his failure to give such notice as was calculated to remove the false impression made by the continued publication of the notice.

The objection that it did not tend to show a partnership but a corporate organization is still less tenable. There may be shares of stock and stockholders in a partnership as well as in a corporate body. Such in fact was the organization of the Peoples' Bank. Lindley's very elaborate work is designed mainly to explain the law of partnership as applicable to stock companies not incorporated. Besides, the notice under consideration declared every stockholder individually responsible for all liabilities, which is true of a partnership, but not true of an incorporated bank, the shareholders in which under the law of this state are liable to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares: 1 Davis Rev. (1876) p. 165, sec. 13.

In answer to the questions which were submitted, the jury found, in substance, that the appellant retired and ceased to be a partner from and after April 1874, but that his retirement was not a matter of public notoriety in the neighborhood where the firm did business at or before February 26th 1877; that appellee had no dealings with the firm before February 23d 1876, the date of the first certificate in suit; that the appellant had done, and permitted acts to be done with his knowledge, which led the appellee

to believe that the appellant "was a member of said firm at the date of any of the instruments sued on," and that at said time the appellee had other notice or knowledge, besides said advertisement, that the appellant had been a partner, and during the time of his dealing with the firm, the appellee, through no carelessness of his own, acted without notice that the appellant had withdrawn and believed he was dealing with partners, individually liable, and not with a corporate body. In view of these facts it is clear that the general verdict in favor of the appellee is in accordance with the merits of the case as shown at the trial, and that the adverse rulings of the court, so far as they appear to be at all questionable, produced no prejudicial result.

The judgment is therefore affirmed with costs.

NECESSITY OF NOTICE.—Mr. Gow in his work on Partnership says as to the liability of a retiring partner: "It has, therefore, been held that a firm may be bound after the dissolution of a partnership, by a contract made by one partner in the name of the firm, with a person who contracted on the faith of the partnership, and had not notice of the dissolution. And the principle upon which the responsibility of the retiring partner proceeds, being his negligent conduct in forbearing to give notice, and the consequent ignorance of the world of the fact of a dissolution having taken place, he will be liable for the engagements of the other partner, entered into in the name of the firm, even with a party whose dealings began subsequently to the dissolution of the partnership." (3 Am. 2d, p. 248). And Lord MANSFIELD said: "If partners dissolve their partnership, they who deal with either without notice of such dissolution, have a right against both." Cowp. 445. So well established is this rule that the retiring partner must give notice of his retirement in order to escape future engagements of the remaining members of the firm, that we deem it unnecessary to further discuss it, and only cite a few of a host of cases to such effect. *Le Roy v. Johnson*, 2 Pet. 186; *Hunt v. Hall*,

8 Ind. 215; *Stall v. Cassady*, 57 Ind. 284; *Hodgen v. Kief*, 63 Ill. 146; *Holland v. Long*, 57 Geo. 37; *Carmichael v. Greer*, 55 Id. 116. And it is no excuse that there has been no time to give such notice. *Martin v. Searles*, 28 Conn. 43; *Mechanics' Bank v. Livingston*, 33 Barb. 458; *Bristol v. Sprague*, 8 Wend. 423; *Wardwell v. Haight*, 2 Barb. 552.

NOTICE MUST BE GIVEN.—The duty of a partner to give notice of his retirement is well stated in the principal case. All the cases are to the effect that some kind of notice must be given if the retiring partner would escape liability as to future obligations entered into by the remaining partner, in the old firm's name. "To create a legal obligation as a partner, it is not necessary in fact, or in law, that the partnership should be still continuing. The legal obligation may arise from the acts of the party at one time, and his forbearance at another time. (Per ABBOTT, C. J., *Goode v. Harrison*, 5 B. & A. 157.) If a partner, on his retirement from a partnership, neglect to notify its dissolution to the world, he is guilty of a delusion, and as he thereby induces strangers to believe that the partnership is continuing, he must abide by the consequences resulting solely from his own negligent imprudence."

Gow on Partnership 305. It will thus be seen that the liability of the retiring member for the future contracts of the remaining member, or members, of the firm, executed in the name of the old firm, with one who had no notice of the dissolution, but who knew such retiring member was a member of the old firm, is placed upon the same broad ground that one who holds himself out as a member of an existing firm will be bound by its contracts. In the case of a holding out it is an active deception practiced by the one holding himself out as a partner, in the other, a passive deception. One is as effectual as the other, and both practices reach the same result. In both cases, the one holding out, or the retiring member, has practiced a fraud upon the injured party, and is estopped to deny that he is a member of the firm, and is held liable for his fraudulent acts.

EXPRESS NOTICE.—In respect to previous customers of the firm, it is necessary that *express notice* be given, or such facts must be shown as will warrant a jury in believing that the party had actual knowledge of the dissolution. *Osborne v. Harper*, 5 East 225; *Price v. Towsey*, 3 Litt. 423; *Ketcham v. Clark*, 6 Johns. 144; *Vernon v. Manhattan Co.*, 17 Wend. 524, s. c. affirmed in Court of Errors, 22 Id. 182; *Wardwell v. Haight*, 2 Barb. 552; *Van Eps v. Dillaye*, 6 Barb. 250; *Bank of Commonwealth v. Mudgett*, 45 Barb. 663; *Kirkman v. Snodgrass*, 3 Head. 371; *House v. Thompson*, 3 Id. 512; *Simonds v. Strong*, 24 Vt. 642; *Amidown v. Osgood*, Id. 282; *Zollar v. Janvrin*, 47 N. H. 327; *Lyon v. Johnson*, 28 Conn. 1; *Martin v. Searles*, Id. 46; *Walkinson v. Bank of Pa.*, 4 Whart. 484; *Mauldin v. Bank of Mobile*, 2 Ala. 503; *Pope v. Risley*, 23 Mo. 187; *National Bank v. Norton*, 1 Hill 579; *White v. Murphy*, 3 Rich. 369; *Lane v. Tyler*, 49 Me. 252; *Taylor v. Hill*, 36 Md. 494; *Rose v. Coffield*, 53 Md. 18; *Merritt v. Pollys*, 16 B. Mon.

356; *Merritt v. Williams*, 17 Kan. 287; *In re Krueger*, 2 Lowell 66; *Holtgreve v. Winker*, 85 Ill. 470; *Hicks v. Russell*, 72 Id. 230; *Southern v. Grim*, 67 Id. 106. All persons are chargeable with notice of the death of a member of a firm; hence no notice of the death need be published, either by representatives of the deceased partner or the survivors. *Marlett v. Jackman*, 3 Allen 287; *Durgin v. Coolidge*, Id. 554; *Price v. Mathew's Succession*, 14 La. An. 11.

ALTERATION OF FIRM NAME.—Where the name is altered and credit given to the new party and not to the old firm, the necessity of notice does not exist. *Kirby v. Hewitts*, 26 Barb. 608; *Pemroy v. Coons*, 20 Mo. 599; *Stewart v. Caldwell*, 9 La. 419; nor is notice necessary where the party did not know of the existence of the firm: *Carter v. Whalley*, 1 B. & Ad. 13; *Kennedy v. Bohannon*, 11 B. Mon. 119; or of its members: *Dowzelot v. Rawlings*, 58 Mo. 75. "Now, where all the names in a firm appear, it may be presumed that every one knows who the partners are." Consequently if one name is dropped out, it is notice to the world of a change in the partnership: *Carter v. Whalley*, *supra*; nor need notice be given where it is merely implied by law. *Bigelow v. Elliot*, 1 Cliff. 41. Where dissolution took place two years previously, and in the mean time, the partner had been doing business separately, notice was inferred; *Coddington v. Hunt*, 6 Hill 596. After eleven years' suspension of the firm's business held no notice was necessary: *Farmers' & Mechanics' Bank v. Green*, 30 N. J. L. 316. While notice of the dissolution must be given to all persons who have dealt with the firm on a credit basis, the rule does not apply to parties who have had mere cash dealings with the firm: *Clapp v. Rogers*, 12 N. Y. 285.

CHANGE OF PURSUITS.—A change of pursuits, or removal from the state, of

one partner, it was held, was not notice: *Lucas v. Bank of Darien*, 2 Stew. 280; nor is the incorporation of the firm; *Goddard v. Pratt*, 16 Pick. 432; and it was held that a deed of assignment constituting a dissolution, put on record, was not notice: *Pitcher v. Barrows*, 17 Pick. 361; this was only a common-law assignment, or trust deed; an assignment under a statute, such as a statutory voluntary assignment, would undoubtedly be notice to all the world.

DORMANT PARTNER.—It is not necessary that a dormant or silent partner should give notice of his retirement: *Evans v. Drummond*, 4 Esp. 89. This is quite obvious, because no credit was ever given upon the faith of his liability: *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Armstrong v. Hussey*, 12 S. & R. 315; *Kelley v. Hurlburt*, 5 Cow. 534; *Benton v. Chamberlin*, 23 Vt. 711; *Ayrault v. Chamberlain*, 26 Barb. 89; *Kennedy v. Bohannon*, 11 B. Mon. 120; *Warren v. Ball*, 37 Ill. 81; *Heath v. Sansom*, 1 Nev. & M. 104; *Cregler v. Durham*, 9 Ind. 375. But it seems that if the ostensible party state the existence of the partnership to a party who deals with the firm, the dormant partner is liable, although the communication be made after the partnership has in fact closed: *Evans v. Drummond*, 4 Esp. 89. And it is very clear if the dealer knew a party was a dormant partner, notice of his retirement must be given to such person, because as to him he is not a dormant partner: *Farrar v. Deflinne*, 1 C. & K. 580; see *Carter v. Whalley*, 1 B. & Ad. 14; *Park v. Wooten's Ex'r.*, 35 Ala. 242; *Edwards v. McFall*, 5 La. Ann. 167; *Nessbaumer v. Becker*, 87 Ill. 281; *Ellis's Adm'r. v. Bronson*, 40 Ill. 455; *Joseph v. Fisher*, 3 Scam. 137.

BURDEN OF PROOF.—Whether or not a previous dealer had notice that a dormant partner was a member of a firm, must be clearly shown before he can recover, especially if the partner was

generally unknown: *Carter v. Whalley*, 1 B. & Ad. 11; *Edwards v. McFall*, 5 La. Ann. 167; *Farrar v. Deflinne*, 1 Car. & K. 580; but in case of a known partner, the burden of proof is on the retiring partner to establish notice, and if the evidence is conflicting, and leaves a doubt as to the matter, the benefit of the doubt will be given to the creditor: *Southern v. Grim*, 67 Ill. 106; *Newcomet v. Brotzman*, 69 Penn. St. 185; *Carmichael v. Greer*, 55 Geo. 116; *Kennedy v. Altwater*, 77 Penn. St. 34; and if he knows the partnership articles provide for a dissolution upon a certain contingency, he is put upon inquiry whether a dissolution has actually taken place: *Smith v. Vanderburg*, 46 Ill. 34.

HOLDING OUT AFTER RETIREMENT.

—The retiring partner, although he may have given notice of his retirement, will be held liable to subsequent dealers if he holds himself out to the public as a partner: *Williams v. Keats*, 2 Stark. 290; *Emmet v. Butler*, 7 Taunt. 600; *Brown v. Leonard*, 2 Chitty 120; *Stables v. Eley*, 1 Car. & P. 614; *Mulford v. Griffin*, 1 F. & F., N. P. 145; *Faldo v. Griffin*, Id. 147; *Western Bank of Scotland*, Id. 463; *Howe v. Thayer*, 17 Pick. 91.

NOTES.—A retiring partner is liable on a note executed in the firm name by the remaining partner after the dissolution, although the plaintiff knew the fact at the time she took the note, where the defendant had suffered his name to continue in the firm: *Brown v. Leonard*, 2 Chit. 120. And if the retiring partner make a payment on the note so executed, he will be held liable for the remainder due: *Eaton v. Taylor*, 10 Mass. 54.

NOTICE TO AN AGENT.—Notice to an agent is not notice to the principal unless the agent was authorized to represent the principal in such matter: *Stewart v. Sonneborn*, 49 Ala. 178; *contra*, *Page v. Brant*, 18 Ill. 37. But notice to a director of a bank, unless it reach those

intrusted with the management of the bank, is not notice to the bank: *National Bank v. Norton*, 1 Hill 572; nor is the fact that one partner became, after dissolution, a director in the bank, notice to the bank of dissolution: *Lucas v. Bank of Darien*, 2 Stew. 280. But if the bank acted upon the notice given to the director, such notice would be sufficient: *Bank of United States v. Davis*, 2 Hill 451. If the president of a bank has knowledge of the dissolution, it is notice to the bank: *Easter v. Farmers' National Bank*, 57 Ill. 216. In *Stewart v. Sonneborn*, 51 Ala. 126, it is said an agent having authority may give notice of dissolution; but it may be said that any one may give notice of dissolution of a firm, and it matters not how or through what channel notice is given, so it reaches the party to be affected by it: *Hicks v. Russell*, 72 Ill. 230; *Southern v. Grim*, 67 Id. 106.

WHO ARE PREVIOUS DEALERS.—As to who are previous dealers must be decided upon the facts in each case; no general rule can be laid down. Selling goods to a firm and delivering them to be paid for afterwards, although no term of credit is fixed, would make the sellers dealers so as to entitle them to notice: *Clapp v. Rogers*, 2 Kern. 283; so a bank which had previously been in the habit of discounting notes and bills for a firm: *Hutchins v. Bank of Tennessee*, 8 Humph. 418; or a person who had been in the habit of endorsing for a firm: *Hutchins v. Sims*, 8 Humph. 423; or lending his note to it for its credit: *Hutchins v. Hudson*, 8 Humph. 426; two previous dealings with the firm will entitle the dealer to notice: *Wardwell v. Haight*, 2 Barb. 549; see *Amidown v. Osgood*, 24 Vt. 278; a single cash sale of cattle does not make the vendor such a previous dealer: *Merritt v. Williams*, 17 Kan. 287.

SUFFICIENCY OF NOTICE.—One of the earliest cases upon the sufficiency of notice is *Godfrey v. Turnbull*, 1 Esp.

371 (1795). That was an action by the plaintiff as indorser of a promissory note against the defendants as makers of it. The defendants had been partners in trade, but the partnership had been dissolved prior to the date of the note. The note was dated April 6th 1793. On March 19th 1793, notice of the dissolution of the partnership, dated the 15th, had appeared in the *Gazette*. The question was, whether the notice given in the *Gazette* was sufficient so as to exonerate the defendant Turnbull (judgment having been rendered against the other defendant by default). Lord KENYON, in delivering the opinion, said: "A secret dissolution cannot discharge the partners; but if the dissolution is notified in the usual way, as it is the only mode by which the fact of the dissolution can be promulgated to the world, at least to those who have had no previous dealings with the partners, it seems sufficient at least to be left to the jury, from thence to infer notice." No proof of any actual notice to the plaintiff was given, but the jury found for the defendant Turnbull. See to same effect, *Wrightson v. Pullan*, 1 Stark. 300. In *Graham v. Hope*, Peake 155, the same judge observed: "The *Gazette* was not of itself sufficient notice to the plaintiff of the dissolution of the partnership. I do not say this for the purpose of this cause merely, but I mean to lay it down as a general rule to govern the conduct of all men. Many people there are in this kingdom who never see a *Gazette* to the day of their deaths, and very mischievous would be the consequence if they were bound by a notice inserted in it. It is incumbent on persons dissolving a partnership to send notice of such dissolution to all persons with whom they had dealings in partnership." See *Kirwan v. Kirwan*, 4 Tyrw. 491.

Although notice may not have been expressly given, it will, under certain circumstances, be presumed. Thus,

where a change had taken place in the name of the firm in the printed checks of a banking-house, it was held that it was a sufficient notice to the customer of a change in the firm: *Barfoot v. Goodall*, 3 Campb. 147; or in an executed power of attorney to prove a debt against a bankruptcy estate: *Hart v. Alexander*, 2 M. & W. 484. But the change in the check is not conclusive evidence of notice: *Newcomet v. Brotzman*, 69 Penna. St. 185. See *Roberts v. Spencer*, 123 Mass. 397. And when the retiring partner gave notice of his retirement by a circular letter, of his assignment to his copartner of all his interest in a ship, but, owing to a defect in the assignment, the registry of the ship was continued in the old firm name, it was held that one doing business with the firm previous to the assignment could not hold the retiring partner for subsequent contracts, because of the defective assignment, he having received one of the circulars: *M'Iver v. Humble*, 16 East 169.

Proof of the insertion of a notice of dissolution in the *Gazette*, although inserted but once, which paper is taken by the party seeking to hold the retiring member of the firm, and left at his house in the usual course, is evidence to be left to the jury, without strict proof that the paper ever reached the party: *Jenkins v. Blizard*, 1 Stark. 338. But notice in the newspapers and mere notoriety, of themselves, do not amount, in law, to notice, although they are undoubtedly proper evidence for the consideration of the jury in determining upon the fact of actual knowledge or notice: *Puge v. Brant*, 18 Ill. 37. The rule is not inflexible that there must be a publication in a newspaper. Any means of fairly publishing the fact of dissolution as widely as possible is proper to be considered on the question of notice: *Lovejoy v. Spafford*, 93 U. S. 430.

But, in *Maudlin v. Bank of Mobile*, 2 Ala. 502, it is said that notice of the

dissolution of a partnership, published in one of the usual advertising gazettes of the place where the business was carried on, and in a fair and usual manner, is not only presumptive, but conclusive, evidence of notice: *Martin v. Walton*, 1 McCord 16; *Shurlds v. Tilson*, 2 McLean 458.

Contra: It is not actual notice: *Vernon v. Manhattan Co.*, 22 Wend. 183; s. c. 17 Id. 526; *Williamson v. Fox*, 2 Wright 214; *Skannel v. Taylor*, 12 La. Ann. 773; *Bank of Brooklyn v. McChesney*, 20 N. Y. 240; *Zollar v. Janvrin*, 47 N. H. 324; *Simonds v. Strong*, 24 Vt. 642; *Austin v. Holland*, 69 N. Y. 571; *Watkinson v. Bank of Pennsylvania*, 4 Whart. 482; *Pope v. Risley*, 23 Mo. 185.

As to all persons, except those who have had dealings with the firm previously, a general public notice calculated to circulate far enough to reach all who are likely to have transactions with the members of the firm will be sufficient notice, and is necessary: *Mitchum v. Bank of Kentucky*, 9 Dana 166; *Whitesides v. Lee*, 1 Scam. 550; *Graves v. Merry*, 6 Cow. 701; *Ketcham v. Clark*, 6 Johns. 144; *Lansing v. Gaine & Ten Eyck*, 2 Id. 304; *Treadwell v. Wells*, 4 Cal. 260; *Green v. Merchants' Ins. Co.*, 10 Pick. 402; *Shurlds v. Tilson*, 2 McLean 458. And in *Hicks v. Russell*, 72 Ill. 230, it is said a newspaper notice is sufficient.

Held, that a notice published in a newspaper taken by the bank was sufficient as to previous dealers: *Bank of South Carolina v. Humphreys*, 1 McCord 388. This case is undoubtedly not in harmony with the general rule as declared by the authorities previously cited.

Where proof has been given that a newspaper containing a notice of dissolution of the partnership between the defendants was taken by the plaintiffs at the time, it is not error to admit in evidence other papers not taken by them by way of establishing the publicity of

the notice and raising the presumption of their actual knowledge of the fact: *Treadwell v. Wells*, 4 Cal. 260; *Reilly v. Smith*, 16 La. Ann. 31.

If the plaintiff did not take or read the paper, it is inadmissible as evidence of notice: *Boyd v. McCann*, 10 Md. 118.

The fact that the firm's name was kept over the door after dissolution of the partnership is not of itself sufficient to authorize the holder of a note signed in the firm name to recover. *Boyd v. McCann*, *supra*.

The fact that the notice is notorious is not sufficient as to past dealers, unless there is an actual notice: *Martin v. Searles*, 28 Conn. 43; *Pitcher v. Barrows*, 17 Pick. 361. See *Holdane v. Butterworth*, 5 Bosw. 1.

The fact that the plaintiffs do business in the same town with the defendants and have an advertisement standing next to the advertisement of the dissolution of the partnership of the defendants, although to be considered in determining whether the plaintiffs had actual notice, is of no avail in law against the fact that they, being dealers previous to the dissolution, have no actual notice. *Lyon v. Johnson*, 28 Conn. 1.

The registry of a mortgage by the remaining member of a firm to the retiring partner, even of goods like those of the firm, or even if brought to the knowledge of the creditor will not, as a matter of law, put him upon his inquiry. *Zollar v. Janvrin*, 47 N. H. 324.

It is error to charge the jury that casual conversations on the street, which the parties do not remember, in relation to a dissolution of a partnership is notice, unless the parties interested are distinctly apprised, and know at the time, it was intended as such notice: *Davis v. Keyes*, 38 N. Y. 94. It is not necessary that the notice, published in a paper, of the dissolution should be signed by any one: *Young v. Tibbitts*, 32 Wis. 79. Where there was a dissolution by agreement, and it appeared to be the practice

of the "London Gazette" office not to insert a notice of dissolution unless signed by all the partners, the defendant who refused to sign a notice was decreed to do so. *Toughton v. Hunter*, 18 Beav. 470. Where, after dissolution, new notes are given by one of the partners in the firm name, the evidence should be clear and satisfactory of the notice of such dissolution to the creditor accepting such notes, to discharge the other partner: *Ransom v. Loyless*, 49 Geo. 471.

A letter stating the dissolution of a firm directed to the defendant, with evidence that the letter was not returned from the Dead Letter Office, is not sufficient, without other evidence of its receipt, to charge defendant with notice of the dissolution. But with slight corroborative evidence, a jury might be justified in finding such notice was given. *Kenney v. Altvater & Co.*, 77 Pa. St. 34. *Contra*, *Hutchins v. Bank of Tennessee*, 8 Humph. 418; nor is a newspaper sent through the mail with the notice marked by a red line drawn around it: *Haynes v. Carter*, 12 Heisk. 7; *Austin v. Holland*, 69 N. Y. 571.

The question being one of diligence and good faith on the part of the retiring partner, he will not be allowed to avail himself of a published notice, unless it appears to have been as reasonable and sufficient as mercantile usage requires, or the public have a right to expect. *Wardwell v. Haight*, 2 Barb. 549; *Wait v. Brewster*, 31 Vt. 516; *Dowzelot v. Raelings*, 58 Mo. 75.

The taking in of a new partner is not notice of dissolution to previous dealers. *American Linen Thread Co. v. Wortendyke*, 24 N. Y. 551.

Nor is the mere discontinuance of business by an old firm and the formation of a new one, evidence, without notice to the creditor, of a dissolution. *Southwick v. Allen*, 11 Vt. 77.

JURY.—It is a question for the jury as to whether notice was actually received. *Whitesides v. Lee*, 1 Scam.

550; *Treadwell v. Welle*, 4 Cal. 260; *Rabe v. Wells*, 3 Id. 148; *Ketcham v. Clark*, 6 Johns. 147; *Rooth v. Quinn*, 3 Eng. Exch. 18; *Jenkins v. Blizzard*, 1 Stark. 418; *Tudor v. White*, 27 Texas 584; *Laird v. Irens*, 45 Id. 622.

DEATH.—Where a note was given by one of the surviving partners after the death of one of their members, the other surviving partners are not bound by it as the death of one of their partners is notice to all the world of the dissolution: *Marlett v. Jackman*, 3 Allen 287; *Durgin v. Coolidge*, Id. 585; *Price v. Mathew's Succession*, 14 La. Ann. 11.

REMOVAL OF FIRM.—Where a firm was doing business in Mobile and dissolved, one of the members going to Milwaukee, forming a new partnership with a third person under the same title of the old firm, it was held that a dealer with the old firm could not hold the retired partner, because he had never given notice of the dissolution; and that the rule of notice did not extend to a case where the business was conducted in a new place, as distant as Milwaukee was from Mobile; that in such case the creditors were bound to inquire as to who formed the partnership in the new location: *Clapp v. Upson*, 12 Wis. 492. So where A and B are partners, and B and C form another partnership, it is not necessary for A to publish a notice that he is not a member of the firm of B and C: *Jones v. O'Farrel*, 1 Nev. 354. Notice of the dissolution need not be given by a member of the firm: *Young v. Tibbets*, 32 Wis. 79.

INSTANCES.—Where a retiring partner has taken the proper steps for publishing his retirement, he will not be liable to parties ignorant of the dissolution of the firm on account of an obligation undertaken by the remaining partners under the old name of the firm: *Newsome v. Coles*, 2 Camp. 617.

The rule does not extend to require notice to the successor in business of a creditor with whom the firm has had

dealings, although such successor may have been a clerk in his predecessor's employ, and as such acquired knowledge of who composed the other firm, and after his succession to the business may have continued to deal with the firm under the impression that the retired partner was still a member of it: *Richardson v. Snider*, 20 Amer. Law Reg. 393.

The rule that notice must be given to old dealers applies only to transactions in the usual course of business: *Whitman v. Leonard*, 3 Pick. 177.

The practice of the old firm "to make monthly reports or returns to persons consigning goods to them," does not legitimately tend to show notice to the plaintiff, a creditor of the old firm, of a change in the partnership; but business letters, written to him by the new firm, are admissible as evidence for that purpose: *Hall v. Jones*, 56 Ala. 493. Notice of the dissolution by publication in a newspaper is notice to an assignee before maturity of a promissory note executed by one of the partners after the dissolution, in the name of the firm, to a person who was chargeable with notice, such assignee having had no dealing with the firm prior to its dissolution: *Hicks v. Russell*, 72 Ill. 230.

Signing a note with the firm name, where the words "in liquidation" are inserted in the body of the note, is of itself notice to the taker of such note that the partnership has been dissolved: *Haddock v. Crocheron*, 32 Tex. 276.

Where the plaintiff was privy to an intention of partners to dissolve their partnership, which was in the course of execution, it was held that, in an action founded upon a supposed subsequent partnership transaction, the plaintiff must show that the intention was abandoned: *Patterson v. Zachariah*, 1 Stark. N. P. C. 58. Express notice, to be available, must be given to every person entitled to it, for a communication of the fact to one may be rendered ruga-

tory and ineffectual by a neglect to communicate it to another, where the rights of the two arise out of the same transaction: *Rooth v. Quin*, 7 Price 193. But where a partnership exists between persons who reside in two different countries, and a dissolution takes place

from the breaking out of a war between the two countries, the existence of the war dispenses with the necessity of giving public notice of the dissolution: *Griswold v. Waddington*, 15 Johns. 57.

W. W. THORNTON.

Indianapolis, Ind.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF KANSAS.²

COURTS OF APPEALS OF LOUISIANA.³

NEW JERSEY PREROGATIVE COURT.⁴

SUPREME COURT OF OHIO.⁵

SUPREME COURT OF RHODE ISLAND.⁶

SUPREME COURT OF WISCONSIN.⁷

AGENT. See *Broker*.

Signature to Check as Agent—Knowledge by Payee of Agency.—

Where a person acts merely as agent for another, and signs a check as agent, and the party with whom he deals has full knowledge of his agency and of the principal for whom he acts, an express disclosure of the principal's name on the face of the check or in the signature is not essential to protect the agent from personal responsibility: *Metcalf v. Williams*, S. C. U. S., Oct. Term 1881.

The ordinary rule undoubtedly is that if a person merely adds to the signature of his name the word "agent," without disclosing his principal, he is personally bound. But if he be in fact a mere agent of some principal, and is in the habit of expressing in that way his representative character in his dealings with a particular party, who recognises him in that character, it would be contrary to justice and truth to construe the instrument thus made as his personal obligation: *Id.*

BAILMENT.

Purchase by Bailee at Wrongful Sale by Third Person—Remedy of Owner against such Third Person—A bailee cannot acquire title to

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

² From A. M. F. Randolph, Esq., Reporter; to appear in 26 Kansas Reports.

³ From Hon. Frank McGloin, Reporter; to appear in vol. 1 of his reports.

⁴ From Hon. John H. Stewart, Reporter; to appear in 34 N. J. Eq. Reports.

⁵ From E. L. Dewitt, Esq., Reporter; to appear in 37 or 38 Ohio St. Reports.

⁶ From Arnold Green, Esq., Reporter; to appear in 13 Rhode Island Reports.

⁷ From Hon. O. M. Conover, Reporter; to appear in 53 Wisconsin Reports.

the property, adverse to that of his bailor, through a tortious seizure and sale of the property by a third person: *Enos v. Cole*, 53 Wis.

Moneys paid by the bailee at such a sale without authority from the bailor, cannot be recovered from the latter: *Id.*

The property having returned to the bailee in such a case, while the bailor might perhaps maintain an action of *trespass* against the person who seized and sold it, and recover therein at least nominal damages, he cannot, without proof of actual damage, maintain an action against such third person as for a *conversion*, and recover even nominal damages therein: *Id.*

BANK.

Certification of Check—Deposit of Check or Note—Right of Depositor to Reclaim—National Bank—Sect. 5228 Rev. Stat.—The certification of a check by the bank on which it is drawn, is equivalent to an acceptance. Such a check stands upon the same footing as an accepted bill of exchange: *Louisiana Ice Company v. State National Bank*, 1 McGloin.

There is a privity between a bank certifying a check, negotiable in form, and every holder thereof up to the time of its extinguishment. The bank may be sued by any such holder: *Id.*

When a bank receives on deposit checks, promissory notes or similar paper, the contract is usually one of deposit for collection only; and where the depositor has not drawn against such deposited paper, he can, at any time before collection, revoke the agency of the bank and reclaim the deposit: *Id.*

The depositors of banks which have formed themselves into a clearing house, are not bound by the rules and regulations or usages of the latter: *Id.*

U. S. Rev. Stats., sect. 5228, does not apply to a case like this. It does not make property belonging to others, found in the custody of a national bank at the time of its suspension, under contracts other than special deposit, liable for the debts of the bank: *Id.*

BANKRUPTCY.

Assignee—Not Interested in Disputes between Secured Creditors.—An assignee in bankruptcy represents the general or unsecured creditors only. He has nothing to do with the disputes of secured creditors among themselves, and a bill filed by him against certain secured creditors to compel them to carry out an agreement with other secured creditors, by which all were to accept a joint security, will be dismissed, it not appearing that the result would affect the general estate: *Dudley v. Easton*, S. C. U. S., Oct. Term 1881.

BILLS AND NOTES.

Protest—Notice to Drawer.—Where the notary protesting a draft, unable after diligent inquiry to ascertain the address of the drawer, directed the notice of protest to him at the place where the draft was drawn or dated; *held*, that this was sufficient: *Page v. Valery*, 1 McGloin.

BROKER.

Agency for both Parties—Right to Compensation.—The double agency of a real estate broker, who assumes to act for both parties to

an exchange of lands, involves, *prima facie*, inconsistent duties, and he cannot recover compensation from either party, even upon an express promise, until it is clearly shown that each principal had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action, and had assented to the double employment. But when such knowledge and consent are shown, he may recover from each party: *Bell v. McConnell*, 37 or 38 Ohio St.

COMMON CARRIER.

Loss after Delivery to Succeeding Carrier—Arrangement with Latter for pro rata Tariff.—In the absence of a special contract with the shipper, a common carrier is not liable for loss of the goods after delivery to the next succeeding carrier upon a through route, and such special contract cannot be implied from the fact that an arrangement existed among all the carriers constituting the through route, whereby goods were to be transported at a stipulated tariff to be apportioned among them pro rata according to distance: *St. Louis Ins. Co. v. St. L., V., T. & I. Railroad Co.*, S. C. U. S., Oct. Term 1881.

CONSTITUTIONAL LAW. See *Intoxicating Liquors*.

Officer of State—When Courts will interfere with his Action—Where the law has vested a discretion in any executive officer of the state, the courts will not control him in its exercise: *State of Louisiana v. Jumel*, 1 McGloin.

Where, however, the discretion has been lawfully exercised by the legislative department, and there remains to such executive officer only the obligation of complying with its mandates, the courts will, if necessary, compel his obedience: *Id.*

Where the state, as the principal, commands the auditor, as its agent, to make a particular distribution of the funds in its public treasury, any proceeding intended to compel him to violate such instructions is an action against the state, which, by reason of its sovereignty, will not lie: *Id.*

CONTRACT.

Illegal Employment—Action for Wages—Minor.—No action lies to recover a minor's wages earned in violation of a statute prohibiting the employment of certain minors in manufacturing establishments: *Birkett v. Chatterton*, 13 R. I.

Interpretation of—Parol Evidence.—Where the language of a written contract is not entirely perspicuous, and is susceptible of two constructions, one showing an agreement apparently fair and reasonable, and the other terms highly favorable to the party preparing the writing and not likely to be knowingly accepted by the other party; *held*, that parol testimony is admissible of the prior parol negotiations, and the situation and admissions of the parties for the purpose of determining in what sense the language of the written instrument was used by them: *Mason v. Ryms*, 26 Kans.

Signature of both Parties Unnecessary—Substitution of New Party—Novation.—Where a contract, not required by the Statute of Frauds

to be in writing, has been reduced to writing and signed by one contracting party only, it is error to treat such contract as of no validity for the reason that it is not signed by the party to be charged: *Bacon v. Titus*, 37 or 38 Ohio St.

An agreement between the parties to a contract and a third person, whereby one party is released from the obligations of the contract and the third person substituted in his stead, is a *novation*, and requires no further consideration than such release and substitution: *Id.*

DEBTOR AND CREDITOR.

Conspiracy to Secrete Property—Action by Creditor who has no Lien.—A., being a creditor of B., brought trespass on the case against C. and others, charging them with conspiring to prevent A. from obtaining payment out of the estate of B. and with receiving from B. fictitious mortgages, by means of which they took B.'s personalty and secreted it so that A. could not attach it, and thus lost his claim. It appearing that A. had no lien on B.'s estate by attachment, levy or otherwise, and was only a creditor at large of B.: *Held*, that the action could not be maintained: *Klous v. Hennessey*, 13 R. I.

DEED.

Construction of—Extrinsic Evidence.—A deed with a description otherwise uncertain should be construed with reference to the actual rightful state of the property at the time of the execution; and extrinsic evidence of that state is admissible to aid in the construction: *Whitney v. Robinson*, 53 Wis.

Where the grantee in such a deed goes into possession of land under it, and fences the same, and makes valuable improvements thereon, with the knowledge and acquiescence of the grantor, this is a practical construction of the deed, binding on the parties and those claiming under them: *Id.*

DEMURRER. See *Frauds, Statute of.*

EVIDENCE. See *Contract.*

Witnesses in Suit removed to Federal Court—Previous Decision of State Court as to Competency.—In a cause removed from a state court to a federal court, the competency of witnesses is to be determined by the Act of Congress (Rev. Stat., sect. 858), and is not affected by the fact that while the case was pending in the state court the witnesses were held by that court to be incompetent under the state law: *King v. Worthington*, S. C. U. S., Oct. Term 1881.

Merchant's Account-book—Original Entries.—A merchant's account-book was offered in evidence; it appeared that the memorandum of sales was made as they took place, on a little pass-book or blotter; that at the close of each day, or at most with a delay of but a day or two, these memoranda were copied into the journal or account-book offered in evidence; it also appeared that these pass-books or blotters had been lost or destroyed, and the party who made the copies in the account-book testified that they were correct. *Held*, no error in admitting such book of account: *Rice v. Simpson*, 26 Kans.

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EXECUTION. See *Partnership*; *Sheriff's Sale*.

Property in hands of Constable.—Where personal property has been levied upon by a constable holding a valid execution, it is not, while in such possession, subject to levy by any other officer, constable, sheriff or marshal, holding process from the same or another court: *Jones S. & P. Co. v. Case*, 26 Kans.

EXECUTOR AND ADMINISTRATOR. See *Surety*.

Legacy—Duty to Compound Interest—Loan of Funds to Co-executor.—A legacy was given to an infant to be put out on bond and mortgage, and to be paid when the infant attained the age of twenty-one years, with interest accruing thereon. *Held*, that it was the duty of the executors to compound the interest as it accrued by investing it as soon as practical thereafter: *Perrine v. Petty*, 34 N. J. Eq.

An executor who, without authority, lends such a fund to his co-executor, on inadequate security, is liable for the amount of the principal and compound interest; and the fact that such investment is stated in his account in the Orphans' Court will not exonerate him: *Id.*

Surety—Liability for Proceeds of Lands Sold—Extent of.—Upon an application to assess the damages on a judgment recovered against an administrator and his sureties, because of his failure to apply to the payment of the intestate's debts the proceeds of lands sold under an order of the Orphans' Court; *Held*, that as the administrator had authority to sell only the lands specified in the order of the Orphans' Court, his sureties are not liable for the proceeds of sale of any other lands, and that there can be no deduction in the administrator's favor because of his failure to exhaust the personal estate of the intestate in payment of his debts before applying the proceeds of the realty thereto: *In re Givens, adm'r*, 34 N. J. Eq.

Mortgage by one Executor to another to Secure Deficit—Continuing Liability.—One of two executors collected a large amount of money due the estate, without his co-executor's knowledge, and, in order to secure the estate, gave a mortgage on his own lands, payable to himself and his co-executor. The property covered by the mortgage was sold under a prior mortgage, and nothing realized therefrom for the estate. *Held*, that the delinquent executor was not, by giving the mortgage, exonerated from liability to his co-executor: *Storms v. Quackentush*, 34 N. J. Eq.

FRAUD.

Retention of Property by Vendee—Effect of.—The retention of personal property by a vendor after sale is, as against his creditors, presumptive but not conclusive evidence of fraud: *Mead v. Gardiner*, 13 R. I.

Hence, when A. conveyed to a creditor restaurant furniture of much less value than the amount of his debt, and was allowed to continue the business temporarily in order to dispose of the furniture, and derived meanwhile no benefit from continuing the business and had no agreement allowing him to redeem the property. *Held*, that the conveyance was good as against the other creditors of A.: *Id.*

Sale of Patent—False Representation as to Novelty.—An action may be maintained by the buyer of a patent right on the false representations of the sellers that they were possessed of a patent giving them exclusive right for an improvement in spring bed bottoms, and that there was no like patent authorized, known by the sellers to be false, which induced the purchase, although by searching the records of the patent office the buyer might have discovered the fraud: *McKee v. Eaton* 26 Kans.

FRAUDS, STATUTE OF.

Promise by Debtor to pay his Creditor's Debt to Third Person.—Where a person agrees to satisfy his obligation to an estate by distributing the sum he holds amongst its creditors, taking their receipts, such an agreement is not in the nature of a promise to pay the debt of another, such as is required by statute to be evidenced by writing: *Decuir v. Ferrier*, 1 McGloin.

Promise to Compensate by Will—Alternative Promise.—A verbal promise in the alternative to compensate a party by will, either in land or money, is within the statute against frauds and perjuries: *Howard v. Brower*, 37 or 38 Ohio St.

Where the agreement sued on is within such statute, and it is fairly to be inferred from the petition that it is not in writing, the defence of the statute is available on demurrer: *Id.*

GIFT.

Corporate Stock—Possession of Certificate and Power of Attorney.—Where stock stood in a testator's name on the books of the corporation, the facts that the certificate is found in the executor's possession, and that the testator gave him a power of attorney to receive and assign any scrip or dividend due him from the company, are not conclusive evidence of a gift of the stock to the executor: *Smith v. Burnet*, 34 N. J. Eq.

INFANT. See *Contract*.

INJUNCTION.

Not Granted to restrain Use of Land by Unlawful Occupant.—Where a party enters into the possession of premises without any authority of the owner, and under pretence of a lease made by an unauthorized agent, and puts said premises to a use which is not forbidden by the law, the owner's remedy is an action at law to recover the possession, and he may not resort to equity and obtain an injunction, and thus take away the constitutional right of a trial by jury, on the ground that such use is in his judgment immoral and mischievous in its tendencies, and one calculated to injure his reputation in the community: *Bodwell v. Crawford*, 26 Kans.

INSURANCE.

Furniture in Particular House—Removal of.—A policy of insurance against fire was issued on articles of furniture described as "all contained in house No. McMillen street, Providence, R. I." The insured, without the knowledge of the insurer, removed these articles

to a house in another street, where they were consumed. *Held*, that the insured could recover on the policy: *Lyons v. Providence Washington Ins. Co.*, 13 R. I.

Waiver of Conditions by Agent.—A policy provided that if it should become void for any cause, it should not be revived by the issue of a renewal receipt, or in any other way except by special contract for that purpose written thereon, or by the issuing of a new policy. *Held*, that it was competent for the agent, acting for the insurer, to waive this as well as other conditions of the policy, and that the insurer, after the issue of the renewal receipt, and especially after having received the premium, was estopped to deny the contract: *Shafer v. Phoenix Ins. Co.*, 53 Wis.

INTOXICATING LIQUOR.

Constitutional Law—Statutory Provision as to Evidence of Illegality.—A statute provided that "evidence of the sale or keeping of intoxicating liquors for sale in any building, place or tenement shall be *prima facie* evidence that the sale or keeping is illegal." *Held*, that this statutory provision was constitutional and valid: *State v. Higgins*, 13 R. I.

LEGACY.

Bequest upon arriving at Age—Payment of.—A testator directed his executors to invest a fund and to pay to his widow, for life or widowhood, one-third of the interest thereof, and to his children and grandchildren, whom he named, the remaining interest in designated portions; that if any such child or grandchild should die without issue, the survivors should take such decedent's share in like portions; that if any of them should die leaving lawful issue over twenty-one years of age, the executor should pay to the representatives of such decedent the principal on which such decedent had received the interest. One child died during the lifetime of the widow, leaving a daughter over twenty-one. *Held*, that the executors could pay her the principal of her share on her producing the widow's release of her interest therein: *Valentine v. Smith* 34 N. J. Eq.

LIBEL.

Publication—When Libellous—Indictment.—A publication is libellous if without charging an indictable offence it falsely and maliciously imputes conduct tending to injure reputation, to cause social degradation, or to excite public distrust, contempt or hatred: *State v. Spear*, 13 R. I.

An indictment for libel is good if it charges the publication of matter not libellous *per se*, but charges such publication with proper inducement and innuendoes to set forth and explain the defamatory statements of the publication: *Id.*

LIMITATIONS, STATUTE OF.

Surety—Partial Payment by Principal.—A payment by a principal debtor, which will take a case out of the Statute of Limitations as to him, will have the same effect as to his surety, who is present for the purpose of seeing that the payment is made and credited, and makes

no statement that any limitation shall be placed on the effect of such act: *Glick v. Crist*, 37 or 38 Ohio St.

MALICIOUS PROSECUTION.

False Imprisonment—Evidence—Statements of Attorney—Damages.—In an action for false imprisonment, proof of the circumstances of plaintiff's family, and of the filthy condition of the jail used for the imprisonment, is admissible upon the question of mental anguish, &c.: *Fenelon v. Butts*, 53 Wis.

In such an action, statements of an attorney-at-law in reference to the second imprisonment of the plaintiff, then threatened, are admissible, where such attorney had acted for the defendant throughout the proceedings which resulted in the first imprisonment, and there is evidence for the jury that he was still so acting when he made such statements; or, where there is evidence that he was a co-conspirator with the defendant; or, where such statements were made in the defendant's presence while the latter was plotting the further imprisonment of the plaintiff, and the evidence was accompanied, or might have been followed, by proof of defendant's assent: *Id.*

While proof of defendant's good faith is admissible to mitigate punitive damages, it cannot be considered to mitigate compensatory damages, including those allowed for injury to the feelings: *Id.*

MASTER AND SERVANT.

Continuance of Employment after Misconduct—Estoppel.—An employer, who continues an employee in his service after learning of negligence or misconduct upon the part of the latter, is estopped from subsequently complaining of such negligence or misconduct: *Marshall v. Sims*, 1 McGloin.

MECHANICS' LIEN.

Waiver of.—A mechanic furnishing material for the construction of a mill, under a contract with the owner, may, by his agreement as to the manner of payment, and his acts with respect to the claims of other creditors, be precluded from asserting a mechanic's lien, as against such creditors, although he has made no express promise that he will not assert such lien: *West v. Klotz*, 37 or 38 Ohio St.

Who entitled—Superintendent of Mine.—One employed for an indefinite time to direct the work in a mine, with authority to employ and discharge miners and procure and purchase supplies, and who, by virtue of such employment, controlled and directed the working and development of the mine, and in the performance of such duties did some manual labor, is entitled to a lien under a statute giving a lien to any person who should perform any work or labor upon any mine: *Flagstaff Silver Mining Co. v. Cullins*, S. C. U. S., Oct. Term 1881.

MORTGAGE. See *Partnership*.

NATIONAL BANK. See *Bank*.

NEW TRIAL.

Verdict Contrary to Instruction—Right of Court to render Judgment according to Evidence.—Where the evidence is clear and undisputed,

the court may direct the jury to find a general or special verdict in accordance therewith, or may itself find the fact and render judgment accordingly; and it is strongly intimated herein that the court, after setting aside a special verdict contrary to the clear and undisputed evidence, may either grant a new trial, direct the proper verdict, or render judgment according to the evidence: *Gammon v. Abrams*, 53 Wis.

A party who, after a special verdict has been set aside, does not ask for a new trial, waives it: *Id.*

A "reaper and self-binder," was delivered to a conditional purchaser in July, and used in the harvest of that season, and found defective. In January or February following, the vendor's agent called on the purchaser in relation to payment for the machine, and the purchaser said he would give nothing for it; but he still kept it and did not offer to return it until the following April. *Held*, that there was no error in setting aside a finding by the jury that the machine was returned in a reasonable time, and rendering judgment for its value: *Id.*

PARTNERSHIP.

Evidence—Notoriety—Liability of one allowing himself to be held out as Partner.—In an action against a partnership managing and operating a bank, it appeared from the evidence that one W., who was charged as a member of the banking firm, and as liable upon their certificates of deposit, was named in the advertisement of the bank as a member of the partnership, and was a subscriber to the paper containing such advertisement. It also appeared that the letter-heads used by the bank contained his name as a partner, and that he received letters which his clerk read and answered, upon such letter-heads. It was further testified to by one of the partners, that W. was a member of the firm. *Held*, that the court committed no material error in receiving in addition to such evidence, and as corroborative thereof, the general understanding and report of the community where the bank existed, to prove W. a partner: *Rizer v. James*, 26 Kan.

Where a person is held out as a member of a partnership with his own assent or connivance, he is responsible to every creditor or customer of the partnership for all its liabilities: *Id.*

Execution—Interest of one Partner—Sale of—Rights of Purchaser.—The interest of a copartner in the partnership property may, in Rhode Island, be attached by an individual creditor of such copartner: *Randall v. Johnson*, 13 R. I.

In such a case the sheriff may seize a chattel and deliver it to the purchaser of the interest attached, who becomes a tenant in common of such chattel with the other partners, but subject to the partnership debts and equities: *Id.*

Mortgage to Firm without naming Individual Partners—Validity of.—G. & W. were partners doing business under the name and style of "The Chicago Lumber Company." A. executed to "The Chicago Lumber Company" a promissory note, and also executed to "The Chicago Lumber Company" a mortgage upon real estate to secure the note. *Held*, that the absence of the names of the individual members of the partnership from the mortgage did not invalidate it; and *held*, also, that in an action upon the note and to foreclose the mort-

gage, G. & W. were authorized upon proper allegations in the petition to show that they were partners carrying on business under the name and style of the Chicago Lumber Company, and the holders and owners of the note and mortgage, and *held*, further, the court was authorized upon default in the payment of the note to foreclose and sell the mortgaged premises: *Chicago Lumber Co. v. Ashworth*, 26 Kans.

PATENT. See *Fraud*.

PAYMENT.

When not Voluntary—Taxes.—Payment of taxes under protest, to an officer who has a warrant for their collection, and threatens to collect by levy and sale of property, is not a voluntary payment *Ruggles v. City of Fond du Lac*, 53 Wis.

REMOVAL OF CAUSES.

Citizenship—Foreign Corporation Operating Railroad under Lease.—A corporation of one state, by leasing a railroad from a corporation of another state, and operating it in the latter state under franchises granted to the corporation from which it is leased, does not become a citizen of the state in which said road is operated, and if sued in such state may remove the suit to the federal courts: *Baltimore & Ohio Railroad Co. v. Koontz*, S. C. U. S., Oct. Term 1881.

SALE. See *Fraud*; *Trover*.

Breakage—Right of Rescission.—Where defendants purchased two hundred casks of Seltzer waters, packed in Prussia, in casks of one hundred stone jugs each, and it is shown that such casks cannot be transported without some breakage of the jugs. *Held*, that these circumstances have entered into the contract, and where the actual breakage is not beyond what is usual, the vendee cannot refuse to receive the property and rescind the contract: *Hays v. Smith*, 1 McGloin.

Sample—Written Contract.—A written contract of sale which does not show that it was made by sample cannot be explained or modified by proof that it was so made: *Wiener v. Whipple*, 53 Wis.

SHERIFF'S SALE.

Waiver by Debtor of Legal Formalities—Liability of Sheriff to Creditors for Omission.—A renunciation by an insolvent debtor in favor of a particular creditor, dispensing with any of the forms of law, by which the value of his property sold under execution is diminished, is contrary to good morals: *Tipery v. Harper*, 1 McGloin.

A sheriff, aware of the insolvency of the debtor, who executes an order of sale waiving the formalities and delays of advertisement, although such sale is consented to by the seizing creditor, is liable in damages to a creditor who has suffered by such a proceeding: *Id.*

The price brought by the property so sold will not be taken as a standard of its value: *Id.*

SURETY. See *Executors and Administrators*.

Assignee—Objections to Creditor's Claim.—After the damages have been assessed against an assignee and his surety, on their bond given

under the assignment act, the surety cannot have the amount of a creditor's claim deducted therefrom, on the ground that it was not presented to the assignee under oath, where such claim was allowed and included in all of the assignee's accounts, and no creditor objects thereto. He is bound to answer for all the money found due from his principal: *In re Estate of Stelle*, 34 N. J. Eq.

Surety—Right to be Relieved.—The right of sureties to be relieved from responsibility for the future acts or defaults of administrators or guardians is absolute, and, on a proper application, must be granted. Where, however, the sureties do not appear on the day set by the court for the hearing, their application may be treated as abandoned, and may be dismissed: *Allen v. Sanders*, 34 N. J. Eq.

TAXATION.

Bank—Foreign Investments.—The investments in foreign countries of part of the capital of a bank, if of the character usually made by banks in doing a banking business, are liable to taxation by the state in which the bank is incorporated: *Nevada Bank v. Sedgwick*, S. C. U. S., Oct. Term 1881.

Whether, if such investments had been made in fixed property subject exclusively to another jurisdiction, a different rule would apply, not considered: *Id.*

TRIAL.

Order of addressing Jury.—In an action to recover damages for assault and battery, where an issue was joined on an answer justifying the alleged trespass, the court allowed defendant to begin and close, in offering testimony and in the argument. *Held*, (1) that unless there were special reasons authorizing the court to otherwise direct, the right to begin and close was in the plaintiff. (2) Unless it affirmatively appears that special reasons did not exist, which would authorize the court to change the order of proceedings at the trial, or, that the plaintiff was prejudiced thereby, a judgment for the defendant will not be reversed: *Dille v. Ingersoll*, 37 or 38 Ohio St.

TROVER. See *Bailment*.

Fraudulent Purchase of Chattels—Right of Owner—Innocent Transferee.—H., the owner of chattels, relying on the representations of R. that he was the agent of L., agreed to sell the same to L. on credit, and H., in the belief that R. was such agent, delivered the chattels to him, when in fact he was not such agent, nor had he authority to purchase for L., as he well knew. *Held*, that the property in the chattels did not pass from H., and that L., who bought the chattels of R. and converted them to his own use, without knowledge of the fraud, was liable to H. for their value; and the fact that R., at the time the chattels were delivered to him, paid H. part of the price agreed on, will make no difference, except as to the amount of recovery against L.: *Hamet v. Letcher*, 37 or 38 Ohio St.

UNITED STATES COURTS. See *Evidence*.

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MARITIME LIENS.

(Continued from p. 88, ante.)

THE second class of liens which it is proposed to consider are those which arise by virtue of the municipal law, but which are enforceable in the admiralty.

The most noteworthy causes of this character are those arising from the liens of material men for services rendered in the "home port" of the vessel.

The maritime law of the United States is that, if repairs have been made or necessities furnished to a ship in the port of a state to which she does not belong, or to a foreign ship, the material-man's lien is dependent wholly on the principles of the general maritime law, and he may, irrespective of the municipal law, proceed *in rem* to enforce it in any District Court of the United States which may, by seizure of the vessel, obtain jurisdiction. So far then do we follow the general maritime law; we say to the libellant, that the contract being maritime, he can proceed in the admiralty, and that the usual methods of procedure, both in *personam* and *in rem*, are open to him, but that if he elects to file a libel *in rem* when no maritime lien exists, he must abide the consequences. Jurisdiction and jurisprudence go hand in hand; the existence or non-existence of the lien is a matter of law, and is in each particular case decided in accordance with the principles of maritime jurisprudence. This is certainly not only good law but good logic. But, on the other hand, if the repairs have been made or necessities furnished to a ship in the port of a state to which she belongs, technically known as her "home port," the question

of lien or no lien is no longer determinable by *maritime* jurisprudence, but by *local municipal* law ; and though the contract be maritime, though the repairs be made on the credit of the ship, the material-man has no lien other than that which is given him by the local law ; we do not deprive him of his right to sue in the admiralty, we do not declare his contract to be no longer maritime, but we say that his rights as a *lien* claimant must depend on the municipal law and not on the law maritime.

The father of this curious offspring was *The General Smith*, 4 Wheat. 438.¹

The immediate effect of the decision of the Supreme Court in the case of *The General Smith* was to restrict the suitor to a personal action, whether prosecuted in the admiralty or common-law courts. He had his common-law lien, but this was valueless without that possession which was impracticable if not impossible. Realizing this, the legislatures of the several states came to his relief: acts creating maritime liens, or liens in the nature of maritime liens enforceable by actions in the state courts, were passed by the several state legislatures. When the constitutionality of those several acts was tested, they were closely scrutinized, and whenever they purported to create a maritime lien, they were declared unconstitutional, and when they fell within these limits and were but *quasi* maritime in character, their enforcement in the state courts was prohibited: *The Belfast*, 7 Wall. 624 ; *The Moses Taylor*, 4 Id. 411.

After various modifications of the admiralty rule, the question in 1874 again came squarely before the Supreme Court, and it was held that no maritime lien existed for repairs made in the home port of the vessel, but that so long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessities to a vessel in her home port may be regulated in each state by state legislation.

State laws, it was said, cannot exclude the contract for furnishing such necessities from the domain of admiralty jurisdiction, nor

¹ *Held*, that in respect to necessities and repairs in the port of a state to which the ship belongs, the case is governed by the municipal law of that state, and that no lien is implied unless it is recognised by that law. It is noticeable that at the time that this case was decided, the Supreme Court were of the opinion that the admiralty jurisdiction was commensurate with the commercial clause in the Constitution, and that it therefore did not extend to contracts of affreightment between two ports in the same state, nor to supplies furnished to a vessel engaged in such trade. From this position they have long since receded: *The Belfast*, 7 Wall. 624.

can they confer such jurisdiction upon state courts as to enable them to proceed *in rem* for the enforcement of liens created by state laws, but the District Court of the United States having jurisdiction of the contract as a *maritime* one, may enforce liens given for its security even when created by state laws: *The Lottawanna*, 21 Wall. 558; see also, *The John T. Moore*, 3 Wood's R. 61.

Nominally, *The Lottawanna* was decided on the doctrine of "*stare decisis*," *The General Smith* was cited with approval; in name it was followed, it would seem, however, in principle at least, that *The Lottawanna* has created a new order of things. If we understand *The General Smith* aright, it stated the maritime law of the United States to be that in respect to necessities and repairs in the port of a state to which a ship belongs, the case is governed by the municipal law of that state, and that no lien is implied unless it is recognised by that law. If we understand *The Lottawanna* aright, it states the maritime law of the United States to be that in respect to necessities and supplies furnished to a ship in the port of a state to which she belongs, *there exists no maritime lien*, but that, until Congress chooses to interpose, the rights of material-men furnishing necessities to a vessel in her "home port" may be regulated in each state by the state legislature. If this interpretation be correct, the distinction is not only obvious but significant; the maritime law of the United States is no longer dependent on the municipal law, but is decisive whether the vessel be domestic or foreign, and by its terms the material-man can have no maritime lien, if the repairs be made or necessities furnished to a vessel in the port of a state to which the vessel belongs, but may have a lien if the repairs be made or if the necessities be furnished in the port of a state to which she does not belong. If the vessel be in her home port, and the state statute is sought to be enforced in the admiralty, the requirements of the statute must be complied with. The act should be referred to in the proceedings, and if the statutory requirements are not complied with, the admiralty court will not enforce the lien, but once the cause is properly before the court, the principles and mode of procedure followed in the admiralty will govern it: *Davis v. New Brig*, Gilp. 473; *Boon v. Hornet*, Crabbe's R. 426; *In re Indiana*, Id. 479; and though the liens given by state laws may be enforced in districts which are without the state, the order of priority given by the statute will be disregarded if in conflict with liens having

priority by the maritime law: *Underwriters' Co. v. Katie*, 3 Wood's R. 182.

What vessels are to be accounted foreign and what domestic: Foreign vessels are divisible into two classes, one in which the vessel is foreign, as evidenced by her flag and enrolment, the other in which she is foreign by reason of her having her home port in another state. In the first class of cases, the question of nationality is in issue; in the second, the nationality is not in dispute, but the inquiry is in what state do her actual owners reside, or, in other words, where is her veritable home port.

If a vessel fly a foreign flag, have on her stern a foreign name, and is registered as belonging to a foreigner, there can be no doubt that, *prima facie*, she is what she purports to be, foreign. Suppose, however, that the actual ownership and the apparent ownership be different, not from inadvertence or neglect, but by design. Suppose, for example, she is actually owned by an American citizen, but that she is commanded by a foreigner, or that she was built in a foreign country, or that she took refuge under foreign colors during our civil war, or is for any other cause debarred from claiming American registry.

It is plain that in such a case the legal and equitable ownership are purposely kept apart; that the legal owner is a man of straw, a citizen of the flag under which she sails, and that the actual owner is the mortgagee, who is unable to procure an American register. In cases of this character, what is the position of the material-man dealing with the vessel when she is at the residence of her equitable owner?

The cases naturally divide themselves into two classes, viz., those in which he was aware of her history, and those in which he was ignorant of it.

In the first class of cases, though the authorities are not entirely harmonious, the more general opinion would seem to be, that if the vessel be at the time at the residence of her *actual* owner, and this circumstance be known to the material-man, he will be concluded thereby, and that as to him, she will be domestic even though she fly a foreign flag, and her legal ownership, as evidenced by her enrollment, be likewise foreign: *The E. A. Bernard*, 2 Fed. Rep. 712; *The Alice Tainter*, 5 Benedict 391; see *contra*, *The Geo. T. Kemp*, 2 Lowell 478. But if, on the other hand, the material-man be ignorant of the fact, the rule is otherwise, or, in other

words, her equitable owner having held her out to the world as foreign, will be estopped from denying her national character: *The Walkrien*, 3 Benedict 394; *The St. Iago de Cuba*, 9 Wheat. 409.

When the *nationality* of the vessel is not involved, the question may arise in this way: The citizen of one state may make a sale of her to the citizen of another, but from inadvertence or neglect the change of ownership may not appear on her register. *Prima facie*, the home port of the vessel is the port of her enrolment, but when the port of her enrolment and the residence of her actual owner are different, the rule is that the material-man dealing with her at the residence of the true owners, knowing them to be owners, cannot claim that the vessel was foreign because she is registered in another state: *Hill v. The Golden Gate*, 1 Newberry 308; *The Plymouth Rock*, 13 Blatch. 505. Though the lien given by the general maritime law and that given by the municipal law are both enforced in the same forum—the former, by reason of its characteristics, universality and the ease with which it is enforced, is in general preferable, and this is especially true when, by reason of numerous libels filed in the cause, the question of priority becomes important.

The general principle which governs in determining the question of precedence between lien claimants claiming under pure maritime law liens, is, that he whose service or expenditure has preserved the vessel as a security for a pre-existing debt has priority; so that, practically, the last service performed or advance made takes precedence over all previous ones.

The services performed at the latest hour are most efficacious in bringing the vessel and her freightage to their final destination, each foregoing encumbrance therefore is actually benefited by means of the succeeding encumbrance, and a court of admiralty as a court of equity in adjudicating cases of conflicting liens of this nature takes this as the principle of its decisions: 49 London Law Mag. 146.

It is obvious that in the application of this principle, the very nature of some liens will often secure to them priority over others. The wages of the mariners earned by bringing the ship to her destined port have insured the eventual value of all services previously rendered, and therefore obtain priority over all other liens *ex contractu*, or *quasi ex contractu*, as for salvage, pilotage, towage

or bottomry.¹ Wages antecedently earned, as in an outward or divided voyage, or due under contract at the expiration of stipulated terms, without reference to the ship's arrival at the port of destination, will be postponed to subsequent salvage, but no such distinction will give bottomry bonds precedence over them: *The Constancia*, 4 Weekly Notes of Cases 68. Bottomry bonds have precedence over prior salvage, and give way to subsequent salvage, pilotage and towage.

The lien for damages, originating in the wrong of the master and crew of the vessel in fault, and founded on consideration of public policy for the prevention of careless navigation, takes precedence of all liens *ex contractu*, and in the event of the vessel proving insufficient to meet all the demands, the liens of wages, towage, pilotage and bottomry will be absorbed: *The Benares*, 7 Weekly Notes of Cases 54; *The Enterprise*, 1 Lowell 455. A maritime lien accrues from the instant of the happening of the circumstance which creates it, and not from the intervention of the court; the latter is but a process to render perfect an inchoate right: *The Pacific*, L. R., 32 Ad. 120. From this it follows that the mere circumstance of prior seizure, or a prior decree obtained by superior diligence, will not affect the order of priority, when all the claims are pending together: *The Brig E. A. Bernard*, 2 Fed. Rep. 712. But see *contra*, *The General Burnside*, 3 Fed. Rep. 228; *The Schooner De Wolf*, Id. 236.

As between material-men claiming under the general maritime law and others claiming under the quasi maritime lien accorded to them by state legislatures, the better opinion is that the former have priority, even though their service be anterior in time: *The E. A. Bernard*, cited *supra*; *The John T. Moore*, 3 Wood's R. 61. See, *contra*, *The Daniel Brown*, 9 Benedict 309; and also *The General Burnside*, 3 Fed. Rep. 228; *The De Wolf*, Id. 236. As between various material-men claiming under a quasi maritime lien, the rule of priority, given by the admiralty law, will govern, notwithstanding the provisions of the state act; *Underwriters'*

¹ Abbott on Shipping, 12th ed., p. 596, and note. But the lien for salvage will take precedence over claims for wages earned before the accident, and it would seem that though the lien for wages earned prior to the accident is not absolutely extinguished, it continues subject to the salvor's lien. The lien for salvage takes precedence over that for general average: *The Spaulding*, 1 Brown's Ad. R. 310; *Collins v. The Fort Wayne*, 1 Bond 476; *The Fanny*, 2 Lowell 508.

Wrecking Co. v. The Katie, 3 Wood's R. 182; *Hatton v. The Melita*, 3 Hughes R. 494. When no voyage has intervened, the various repairs put on the ship during her stay in port will, in contemplation of the law, be deemed contemporaneous: *The Fanny*, 2 Lowell 508.

A mortgage on a ship is not a lien in the admiralty, and in the distribution of a fund, the mortgagee will be postponed to all claimants who have maritime liens; whether or not he should be preferred to material-men claiming under quasi maritime liens is doubtful.¹ It must be admitted that the status of parties, claiming under liens which have herein been considered as quasi maritime, is still far from satisfactory.

It is to be regretted that Congress has not yet thought fit to pass a uniform law regulating the rights of material-men, instead of leaving the liens of material-men in the home port of the vessel to the mercies of the legislatures of the various states. The life tenure, industry and varied learning of the federal judiciary have been the means by which the maritime law of the United States has been placed on a basis of which we may well be proud; but as long as liens varying in character and framed for proceedings in common-law courts are enforced in another forum, and one in which an opposite jurisprudence prevails, the rights of suitors must necessarily be doubtful, and the symmetry of the law be impaired.

THEODORE M. ETTING.

MECHANICS' LIEN ON PERSONAL PROPERTY.

I. DEFINITION.—NATURE.—POSSESSION.—The term "lien" is a Norman-French word, and literally means a tie, bond or connection. At common law it is defined to be a mere right in one man to retain personal property in his possession belonging to another, until certain demands of him, the person in possession, are satisfied: *Hammonds v. Barclay*, 2 East 235; *Doane v. Russell*, 3

¹ The lien of the mortgagee has been sustained in the following cases: *Underwriters' Wrecking Co. v. The Katie*, 3 Woods's R. 182; *Baldwin v. The Bradish Johnson*, 3 Id. 582. But the general current of authority is contra.

Gray 382. In courts of equity the term "lien" is used as synonymous with a charge or encumbrance upon a thing when there is neither *jus in rem* nor *ad rem*, nor possession of the thing.

A "lien" is a vested right (*Jordan v. Wimer*, 45 Iowa 65), and as such is protected by the Constitution of the United States: *Gunn v. Barry*, 15 Wall. 610. Legislative power cannot impair it: *Hannah v. Felt*, 15 Iowa 141; *Lefever v. Witmer*, 10 Penn. St. 505. At common law it is nothing more than a personal right, and therefore unassignable: *Daubigny v. Duval*, 5 Durnf. & East 604; *Ruggles v. Walker*, 34 Vt. 470; *Wing v. Griffin*, 1 E. D. Smith 162; *Cairo & Vincennes Railway v. Fackney*, 78 Ill. 116. It is so far a personal right that an officer cannot take in execution property which the debtor holds in respect of a lien only: *Legg v. Evans*, 6 Mees. & Wels. 36. A lien is a collateral security, because a suit may be brought on the debt without impairing the right to retain the property (*Gerrard v. Moody*, 48 Ga. 96), and as such security it is frequently more available than the debt itself.

A lien depends upon contract (*Allen v. Ogden*, 1 Wash. C. C. Rep. 174), express or implied: *Baker v. Hoag*, 7 Barb. 117; but though dependent upon it, the lien forms no part of the contract: *Frost v. Hsley*, 54 Me. 345. This right is favored because it is founded on natural justice; it operates to prevent circuity of action, and applies to all actions, whether founded on contract or upon tort: 3 Pars. Cont., 6 ed. 235. As a set-off it is restricted to the particular debt for which it is a security. A debt owed by the party who holds the lien can be set off against that for which he holds the lien only by his consent: *Pinnock v. Harrison*, 3 Mees. & Wels. 532. The right is founded on the fact that the mechanic has bestowed labor and means upon the property, at the request and in the manner directed by the owner: *Mathias v. Sellers*, 86 Penn. St. 486; *Chase v. Whitmore*, 5 Maule & S. 188; *Townsend v. Newell*, 14 Pick. 332; *Steadman v. Hockley*, 15 Mees. & Wels. 557. An increased appreciable value of the property is not necessary to give the right, if skilful labor has been expended as directed: *Steinman v. Wilkins*, 7 W. & S. 466. Without the performance of services there cannot be a lien: *Lambert v. Robinson*, 1 Esp. 119.

Possession.—At common law there could be no lien when there was no possession: *The Bold Buccleugh*, 7 Moore P. C. 267.

The right is that of a security resting on property for the payment of a debt, and it cannot be separated either from the possession of the property or from the debt; it is collateral to the debt, and it must accompany the possession: *Whitney v. Peay*, 24 Ark. 22; the lien is incident to the possession: *Kimball v. Ship Ann*, 2 Clifford C. C. 4. The criterion of title to personal property is, and always has been, possession, transfers of chattels corporeal being most frequently effected by mere delivery, unaided by formal conveyances or the sanction of a public registry; and suffering the owner to remain in possession would enable him to defraud others ignorant of the lien: *Allen v. Spencer*, 1 Edm. 117. The possession must be lawful; by an illegal or fraudulent act or breach of duty a lien cannot be acquired: *Randall v. Brown*, 2 How. 406; nor obtained by an act of fraud; neither by a tortious conversion: *Hotchkiss v. Hunt*, 49 Me. 213.

II. HOW ACQUIRED.—1. By *common law*; 2. By *usage*; 3. By *statute*; 4. By *contract*. By *common law* the right was originally confined to cases where persons, from the nature of their occupation, were under legal obligation, according to their means, such as common carriers, to receive and take care of the personal property of others. But at the present time the right, with very few, if any, exceptions, is given to every bailee for hire who has bestowed labor and expended means on the personal property of another: *Naylor v. Mangles*, 1 Esp. 109; per PARKE, B., in *Jackson v. Cummins*, 5 Mees. & Wels. 349; *Grinnell v. Cook*, 3 Hill 486; *Wilson v. Martin*, 40 N. H. 88. The law of lien was recognised in this country at an early day, and is a part of our common law: *McIntyre v. Carver*, 2 W. & S. 392.

Usage.—From the earliest times this right has been given by usage of trade, independent of special agreement, when there is no special contract inconsistent with its existence: *Morgan v. Congdon*, 4 Comst. 552; *Fielding v. Mills*, 2 Bosw. 489; *Hodgdon v. Waldron*, 9 N. H. 66. Liens arising from usage are of two kinds: *first*, of trade generally; *second*, between the parties. To create the first kind the usage must be universal, uniform and have been sufficiently long continued to afford a presumption that it was known by the party to be affected by it: *Porter v. Hills*, 114 Mass. 106; *Homer v. Watson*, 62 Mo. 209; *Scudder v. Bradbury*, 106 Mass. 422. The lien of the second kind requires proof

of the parties having dealt upon the basis of such lien. Such proof will be presumptive evidence that the parties continue to deal upon the same terms.

When a lien is claimed by usage of trade, the fact and the extent of the usage are questions of evidence: *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. 67. The true office of a usage or custom is to interpret the otherwise indeterminate intention of parties: *The Reeside*, 2 Sumn. 569. A usage may be established by one witness: *Robinson v. United States*, 13 Wall. 363. But parol evidence of custom or usage is not admissible to contradict or vary an express contract: *Partridge v. Ins. Co.*, 1 Dillon C. C. 139; *Barnard v. Kellogg*, 10 Wall. 383.

Liens by statute include some of those which exist at common law, but have been modified by statutory enactments, and also those which subsist entirely by virtue of statutory regulations. Such liens are intended to secure the ends of justice when the possession is not with the lien claimant: *Beall v. White*, 94 U. S. 382, or where the exclusive possession is not possible. By statute, in nearly all the states, mechanics and material-men, or persons who furnish labor or materials for the construction of houses or other buildings, are entitled to what is known as a "mechanic's lien," which secures to the holder a preference over other creditors in the payment of debts out of buildings constructed of materials furnished, and to the land, to a greater or less extent, on which the buildings stand.

Statutory liens have, without possession, the same operation and effect that existed by common-law liens where the possession was delivered: *Beall v. White*, 94 U. S. 382. But the exercise of such statutory rights will not be extended beyond the powers plainly given: *Cairo & St. Louis Ry. Co. v. Watson*, 85 Ill. 531; *Tucker v. Shade*, 25 Ohio St. 355; and this rule applies to municipal liens: *Wilson v. Allegheny City*, 79 Penn. St. 272. To secure the rights conferred by a lien given by statute, its provisions must be complied with: *Hardin v. Marble County*, 13 Bush 58.

Maritime Liens.—A discussion of this branch of the subject is rendered unnecessary by the publication of the article on maritime liens, the conclusion of which immediately precedes this article, and to which the reader is referred.

Lien by Contract.—The right to create a lien by contract when none existed by law, is unquestionable: *Gregory v. Morris*, 96 U. S. 619. The effect of an express antecedent contract between the parties is to prevent an implied lien arising inconsistent with the terms of the contract: *Stevenson v. Blakelock*, 1 M. & Selw. 535; and it seems that when a lien by contract is relied upon, a lien at common law may be available if the contract is negatived: *Jackson v. Cummings*, 5 Mees. & Wels. 342.

Lien on after-acquired Property; Chattel Mortgage.—To render effectual at law a provision in a chattel mortgage which is intended to be a lien on after-acquired property, the lien claimant must, after the property has been acquired by the mortgagor, obtain the possession thereof: *Chapin v. Cram*, 40 Me. 561; *Rowan v. Sharp's Rifle Manf. Co.*, 29 Conn. 282; *Titus et al. v. Mabee et al.*, 25 Ill. 257; *Rowley v. Rice*, 11 Metc. 333; *Carrington v. Smith*, 8 Pick. 419; *Jones v. Richardson*, 10 Metc. 481; *Moody v. Wright*, 13 Id. 17; *Barnard v. Eaton*, 2 Cush. 294; *Codman v. Freeman*, 3 Id. 306; *Chesley v. Josselyn*, 7 Gray 489; *Henshaw v. Bank of Bellows Falls*, 10 Cush. 568; *Chynoweth v. Tenney*, 10 Wis. 397; *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Id. 207; *Bryan v. Smith*, 22 Ala. 534; *Hunt v. Bullock*, 23 Ill. 320; *Single v. Phelps*, 20 Wis. 398; *Congreve v. Evetts*, 10 Exch. 298; *Hope v. Hayley*, 5 E. & B. 830; *Gale v. Burnell*, 7 Q. B. 850; *Lunn v. Thornton*, 1 C. B. 379; *Robinson v. McDowell*, 5 W. & S. 228; *Williams v. Briggs*, 11 R. I. 476. Such a mortgage is considered as an executory agreement which operates as a license, authority or power, revocable in its nature, until the creditor is put into possession of the property at the time or after it comes into existence or is vested in the debtor. As soon as that new intervening act has intervened, the lien of the creditor becomes perfect, and in the absence of statutory regulations, prevails over the liens of subsequent executions: *McCaffrey v. Woodin*, 65 N. Y. 459.¹

Such is the rule at law. Equity, however, regards such a mortgage as sufficient to charge the property when acquired, and with-

¹ In Michigan, a chattel mortgage intended to bind after-acquired property, is held to be binding as between the parties to the mortgage, and also as to third parties having notice; the intervening act of the mortgagee is not requisite to perfect his lien: *American Cigar Co. v. Foster*, 36 Mich. 368; *Robson v. Michigan Central Railroad Co.*, 37 Id. 70.

out the intervening act of the mortgagee, with an equitable lien, or as creating an equitable title in it in favor of the mortgagee against the mortgagor; and some of the cases maintain that such is the rule against attaching creditors, especially when they have actual notice of the mortgage: *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story 680; *Pennock v. Coe*, 23 How. 117; *Galveston Ry. v. Cawdrey*, 11 Wall. 459; *United States v. Orleans Ry. Co.*, 12 Id. 362; *Butt v. Ellett*, 19 Id. 544; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Seymour v. Canandaigua & Niagara Falls Ry. Co.*, 25 Barb. 284. The principle governing these decisions is, that the mortgage, though inoperative as a conveyance, is operative as an executory contract which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being held as a trustee for the former, in accordance with the familiar principle that equity considers that done which ought to be done.

The rights of parties in property subject to a lien by contract, is entirely a matter of intention of the parties; and the intention must be ascertained from the terms of the contract: *Read v. Fairbanks*, 13 C. B. 692. And when subject to the foregoing rule, the law is settled that when materials are delivered to a mechanic or manufacturer to be made into a chattel and returned, the completed article belongs to the party who furnished the materials; and the rule is the same when repairs are made upon a chattel, the original substance still constituting the principal portion, and the article retaining its identity: *Babcock v. Gill*, 10 Johns. 287; *Foster v. Pettibone*, 7 N. Y. 433; *Pulcifer v. Page*, 32 Me. 404; *Eaton v. Lynde*, 15 Mass. 242; *Stevens v. Briggs*, 5 Pick. 177. The mechanic may retain the property by virtue of his lien, and maintain an action for his services. But when the mechanic agrees to manufacture a certain article from his own materials, or even to provide the principal part thereof, the title is said to be in the mechanic until the thing is finished and delivered: *Atkinson v. Bell*, 8 B. & C. 277; *Gregory v. Stryker*, 2 Denio 628; *Merritt v. Johnson*, 7 Johns. 473; *McConihe v. N. Y. & Erie Ry. Co.*, 20 N. Y. 495; *Hesser v. Wilson*, 36 Iowa 152.

III. LIENS ARE GENERAL OR PARTICULAR.—General liens are claimed in respect of a general balance of account. They are founded on custom or special contract; they are *stricti juris*,

and are deemed encroachments on the common law, and are not favored: *Taylor v. Baldwin*, 10 Barb. 623; *Houghton v. Matthews*, 3 Bos. & Pull. 485. A lien, however, is sustained when it promotes public policy: *Wilson v. Guyton*, 8 Gill 215.

A particular lien on another's property is the right to retain it for the debt which arises on account of labor bestowed upon, or expense incurred in respect to, the identical property. The right was given by the common law, on the ground of public policy, to persons engaged in certain kinds of business. At the present time the right is given to all persons who take property in the way of their trade or occupation for the purpose of bestowing labor, care or expense upon it. The general rule is that one who bestows his labor on a thing, whether his labor is viewed as that of an ordinary mechanical employee, or that of an agent, has the right to retain the thing until he is paid for his labor and expenses incurred by virtue of his employment. But a sub-agent, as a journeyman employed by a contractor, sustains no personal relation to the principal owner; and, while the contractor may acquire a lien on property in his charge for the expense of the employment of the mechanic who has performed the labor, the mechanic acquires no lien.

IV. INCIDENTS OF THE RIGHT.—By common law a "lien" gives merely the right to retain possession: *Holly v. Huggefords*, 8 Pick. 73. It gives no title, and therefore a sale cannot be made, unless by express contract. The right, such as it is, is superadded to the holder's right to recover for his services by action: *Doane v. Russell*, 3 Gray 382. The right cannot be taken on execution, because an officer can seize only what he can sell; if a sale should be made it would destroy the right: *Legg v. Evans*, 6 Mees. & Wels. 36; *Kitttridge v. Sumner*, 11 Pick. 50. Under a lien created by an attachment, subject to the rights of the lien claimant, the owner may make an absolute or a conditional sale of the property: *Bigelow v. Wilson*, 1 Pick. 483; *Denny v. Willard*, 11 Id. 519; *Fettyplace v. Dutch*, 13 Id. 388; *Calkins v. Lockwood*, 17 Conn. 154; *Arnold v. Brown*, 24 Pick. 89; *Wheeler v. Nichols*, 32 Me. 233. The court cannot make an order that the property shall be delivered to the plaintiff, for it is in the legal custody of the officer: *Blake v. Shaw*, 7 Mass. 505; nor can it be sold by the officer till after judgment and execution: *McKay v. Harrower*,

27 Barb. 463. The rights acquired by such lien are in no way superior to those which the defendant had in the property *at the time when the attachment was made*, except in cases of collusion and fraud. No interest subsequently acquired by the defendant in the property will be affected by the attachment: *Crocker v. Pierce*, 31 Me. 177.

As a general rule a lien is merged in a purchase of the property by the person who holds possession under his lien. But where subsequent to the giving of the lien, the owner has lost the power to sell, as by committing an act of bankruptcy, the purchase being in itself inoperative, will not divest the lien by way of merger, for the title of the property subject to the lien will pass to the assignees: *White v. Gainer*, 2 Bing. 23. A lien acquired under an illegal contract if an executed one may be good; as one arising under usury laws if they impose a penalty but do not invalidate the contract; or a contract made in violation of Sunday laws: *Scarfe v. Morgan*, 4 Mees. & W. 270. A lien though lost when the property is parted with, will revive upon an agreement expressly made, or by virtue of an usage, when the property is returned by the owner: *Spring v. Insurance Co.*, 8 Wheat. 286. But such revival is subject to any encumbrance which immediately, while the property was in the owner's hands, attached to it: *Perkins v. Boardman*, 14 Gray 481. Whether a special lien for work or outlay on a particular article can thus be revived depends upon usage, or the intention of the parties: *Johnson v. The McDonough*, 1 Gilpin 101; *Robinson v. Larrabee*, 63 Me. 116. A lien is not forfeited if the lien-holder who had power to sell intrusts the property to the debtor for the purpose of making a sale: *Thayer v. Dwight*, 104 Mass. 254. Nor is the lien lost by temporarily loaning the property to the debtor: *Hutton v. Arnett*, 51 Ill. 198.

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(To be continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of Missouri.

DAVIS v. SMITH.

A married woman, though possessing a separate estate, can make no contract binding herself personally, or on which she or her personal representatives can be sued at law.

King v. Mittalberger, 50 Mo. 183, overruled.

A note made by a married woman, while she was a *feme covert* and possessed of a separate estate, is not a debt against her for which her personal representative can be sued, nor is it such a debt as can be allowed in the probate court against the general assets of the estate in course of administration.

When a married woman, having a separate estate, dies, it ceases to be such, and stands like any other property she may have owned. One to whom she has incurred an obligation while married has no right to satisfaction of his debt out of any other of her property which is subject to the debts of her general creditors; while the latter, equally with the special creditor, have a right to resort to what was her separate property for payment of their demands.

Where a married woman, possessed of a separate estate, died pending a suit in the circuit court to charge such estate with a note executed by her while married, the suit was properly revived against her heirs. The proper decree of the court, where the finding is for the plaintiff in such case, stated in the opinion.

A note executed by the ancestor cannot, without proof of its execution, be read in evidence against the heirs against whom the suit has been revived, where the latter stand upon an answer made by their guardian denying all the allegations of the petition.

APPEAL from Greene county.

The opinion of the court was delivered by

HENRY, J.—This was a suit originally against Harriet and Patrick R. Smith, her husband, and Robert, as trustee of the said Harriet, wherein it was sought to charge the separate estate of Mrs. Smith with the payment of the balance of a note executed by her, her husband and her said trustee, payable to the plaintiff. Mrs. Smith died while the suit was pending, and after defendants had answered, each admitting the execution of the note, and the husband and wife alleging her coverture when the note was executed; that she received no consideration for her signature; that it was procured by fraud on the part of the plaintiff; that it was not voluntarily executed by Patrick, and that Harriet signed by compulsion of her husband, to which plaintiff was a party, and that she did not intend to charge her separate estate with payment of the note. Robert's answer admitted his execution of the note as trustee of said Harriet. In February 1875, plaintiff filed

a replication to this answer, denying all its defensive allegations. Subsequently, Harriet died, and this suit was revived against her heirs-at-law, and George Hubbard was appointed their guardian *ad litem*, and as such filed an answer, denying all the allegations of the petition, to which no replication was filed. The cause was taken from the Circuit Court of Newton county, where it originated, to Greene county, by change of venue, where on a trial at the October Term 1877, defendant had judgment, from which plaintiff has appealed. On said trial plaintiff read as evidence those parts of the answer of the original defendants admitting the execution of the note, the note itself, a deed conveying the property in question to Robert as trustee for the separate use, &c., of Harriet Smith, and proved that she had no other estate, and that there had been no administration of her estate. No objection was made to the admission of any of the evidence; and the judgment must have been based upon the conclusion that the Circuit Court had no jurisdiction of the cause, Mrs. Smith having died while it was pending. In other words, the argument made here must have prevailed in the Circuit Court, that after the death of Mrs. Smith the plaintiff had a legal demand which he could have presented for allowance in the Probate Court, or that the administrator of her estate, instead of the heirs, was the proper party, even if the Circuit Court could retain, because it had once acquired, jurisdiction. The question is therefore presented whether the plaintiff had a claim against Mrs. Smith or her property of which the Probate Court had jurisdiction. As to the precise nature of the obligation of a *feme covert* who had a separate estate when it was incurred, the authorities are not agreed, but are in inextricable confusion. It is well settled in this state that if she execute a note, and nothing to the contrary is expressed, the creditor may, by a proceeding in equity, have it satisfied out of her separate property: *Whitesides v. Cannon*, 23 Mo. 457. But it is not a lien, or, strictly speaking, a charge upon the property, nor does it bind her personally. All that can be said of it is that it is an anomalous obligation, neither binding her nor her estate, general or separate, but only constituting a foundation for a proceeding in equity, by which her separate property may be subjected to its payment; and, until a decree to that effect is rendered, it is neither a lien nor a charge upon that estate. If she owns, in addition to her separate property, other property in which she has no separate

estate, even where a court of equity enforces payment of the obligation out of the separate estate, it will not, for any deficiencies of the separate estate, allow a resort to her other property; but the proposition urged here is that, after her death, that becomes a personal obligation which, when entered into, was no obligation at all. Except with respect to her separate property, the obligation was a nullity both at law and in equity; and at law, even the ownership by her of a separate property gave it no validity whatever. At law, she is, during her coverture, generally incapable of entering into any valid contract to bind either her person or her estate. In equity, also, it is now clearly established that she cannot by contract bind her person or her property generally. The only remedy allowed will be against her separate property. The reason of this distinction between her separate property and her other property is that, as to the former, she is treated as a *feme sole*, having the general power of disposing of it; but as to the latter, all the legal disabilities of a *feme covert* attach upon her: Story's Eq., sect. 1397.

In *Sockett v. Ray*, 4 Bro. C. C. 485, the Master of the Rolls said: "It is argued that, supposing her a *feme sole*, she could do the act; there the single woman can act, because she can bind herself personally; but is there any contract that this married woman could enter into that would bind her after the termination of the coverture? If she gave a bond, could she be sued upon it after the coverture? Certainly not. A man or a single woman, as they can bind themselves personally, may bind their executors and administrators; but it is not so of a married woman." In *Aylett v. Ashton*, 1 Myl. & C. 105, which was a suit to compel the specific performance of an agreement made by a married woman with respect to her separate estate, Lord COTTENHAM, referring to *Francis v. Nozzell*, 1 Mod. 258, said: "It was there decided, and clearly in conformity with all previous decisions, that the court has no power against a *feme covert in personam*, but that if she has separate property the court has control over that separate property. In all cases, however, the court must proceed *in rem* against the property. A *feme covert* is not competent to enter into contracts so as to give a personal remedy against her. Although she may become entitled to property for her separate use, she is no more capable of contracting than before; a personal contract would be within the incapacity under which a *feme covert* labors."

If the contract of a married woman could, with respect to her personal property, be treated as a personal obligation even in equity, we see no reason why it could not be specifically enforced to the extent of that property; and that it was refused by Lord COTTENHAM in *Aylett v. Ashton*, *supra*, conclusively shows that it was not regarded by him as a personal obligation in any sense whatever. In *Parker, Ex'r, v. Lambert's Adm'rs*, 31 Ala. 89, it was held that "a married woman, owning a separate estate by deed, living apart from her husband by agreement with him, could not at common law make any contract upon which either she or her personal representatives could be sued at law." The contrary was held by this court in *King v. Mittalberger*, 50 Mo. 184, but no authority was cited in support of the decision there announced, and the argument is far from satisfactory. This case was followed by the Court of Appeals in *Horton v. Ransom*, 6 Mo. App. 19, and *Staley v. Howard*, 7 Id. 380; but as *King v. Mittalberger* is in conflict with the general current of authority, both in the United States and in England, and with the principle upon which the separate property of a *feme covert* is charged in equity, we are constrained to recede from the doctrine therein announced, and to bring this court in harmony with the better considered adjudications elsewhere.

It follows from the foregoing premises, that when Mrs. Smith died the note in suit was not a debt against her for which her personal representative could be sued, and it could not be allowed in the Probate Court against the general assets of her estate in course of administration.

It is no demand against her general estate. It could not be allowed as such. It was not a lien upon her separate estate. The right of the plaintiff to satisfaction out of her separate property is a creation of equity, recognisable nowhere else, and enforceable nowhere else. The Probate Court could in no manner adjudicate the demand, not because it has not jurisdiction of equitable as well as legal demands against the estate, but by reason of the special provisions regulating the exercise of the jurisdiction conferred upon that court.

All demands are to be classed in first, second, third, fourth, fifth or sixth class, and to be paid in proportion to their amounts, and no demand of any class can be paid until all previous classes are satisfied. One holding the obligation of a *feme covert* would

have no right to any other property of her estate, and if his demand were placed in either of the classes, he might, if the provisions of the statute were strictly observed, get satisfaction of his demand out of the general property, to the exclusion of other creditors who, as to that property, have a preference over him. Specific provisions are made for those cases in which demands are liens upon any of the property of the testator or intestate, and none of these provisions applies to the plaintiff's claim, for he has no lien. He has no demand against the estate for which he could sue Mrs. Smith's executor or administrator, and has no remedy except that to which he has resorted. Thus far we encounter no difficulty; but here one occurs which should be met by an amendment of the administration law, inasmuch as in this progressive age it is not unusual for married women to execute promissory notes and incur other pecuniary obligations, and to hold property for their sole and separate use.

When a *feme covert* dies, her separate property ceases to be such, and stands upon the same footing as any other she may have owned. While her death does not extinguish the right of one to satisfaction of an obligation incurred by her while a *feme covert*, out of what was her separate property, he has no right to satisfaction out of any other of her property, which is subject to the debts of her general creditors if she has any, and she may have such, while they, equally with the special creditors, have a right to resort to whatever was her separate property for payment of their demands. If, then, the court should find for plaintiff, what judgment shall it render? If it decree the sale of this property for payment of plaintiff's demand, and it should thereby be paid, and there should be other creditors, either general or special, he would obtain a preference to which he is not entitled over either class. Nor can the courts determine in this cause whether there are or not other creditors; for unless parties to the proceedings, if there were any, they would not be bound by such adjudication. It has been ascertained in this case that Mrs. Smith was possessed of no other property; but it has not been, nor could it in this proceeding be, conclusively ascertained that she owed no other debts. The Circuit Court cannot bring other creditors in and take charge of the administration of the estate by allowing demands against it, and making final distribution. That jurisdiction has been confided to the Probate Court: *Titterington v. Hooker*, 58 Mo. 593.

That there is here probably but one creditor, and only this specific property, cannot change the principle or warrant an assumption by the Circuit Court of probate jurisdiction. Therefore, all that this court can do, if it finds for the plaintiff, is to enter a decree charging this property with plaintiff's demand—with directions to the Probate Court of the proper county, where letters of administration on the estate shall have been granted, to have the demand paid out of the property, if no other creditors of the estate appear within the time allowed by the administration law. If other creditors appear, and have claims allowed, then this demand of plaintiff shall be placed in the class to which it would be entitled under the administration law if it were an ordinary demand against the estate. There being no other property, it stands upon the same footing as other unpreferred demands against the estate. This would not be proper if there were other property and general creditors of the estate. In such case, the directions should be such that the preference of the general creditors in the assets, other than what was her separate property, should be preserved, and any preference of the special creditor in the latter should be prevented. If the other general assets should be exhausted, and leave the general creditors unpaid, in whole or in part, they would have an equal right to the payment of their unpaid balance out of such other estate with the special creditor for the amount of his claim. That is *his* demand, and the respective balances due them would be paid in proportion to the amount then due and unpaid to said special and general creditors respectively. With respect to the pleadings, plaintiff, under sect. 5, Wagner's Statutes, p. 1050, must prove all material allegations put in issue by the answer of the guardian *ad litem*. The pleading of Mrs. Smith is to be taken as that of her representative, unless the latter see proper to file amended pleadings. Here the guardian, for his ward, filed an answer denying all the allegations of the petition, and thereby put plaintiff to proof of the same, as if there had been no answer filed by Mrs. Smith. If objection had been made, it would have been error to allow plaintiff to read portions of Mrs. Smith's answer as evidence, or to read the note without proof of its execution. Mrs. Smith's answer, without an affidavit denying the execution of the note, was not sufficient to put plaintiff to proof of its execution; but the heirs are not presumed to know whether their ancestor did or did not execute it, and therefore could not be required to make

such an affidavit in order to impose on the plaintiff the burden of proving its execution.

Judgment reversed, and cause remanded.

SHERWOOD, C. J., and NORTON, J., dissenting.

The principal case brings up the subject of a married woman's liability upon her contracts. It goes without the saying that the subject is one of general importance. Not only that, but in respect to certain questions pertaining to it great interest attaches by virtue of the diversity of opinion which prevails in our judicial tribunals.

Of course at common law a *feme covert* was not competent to enter into contracts, and no action against her could be maintained thereon. That point was conclusively settled by the great case of *Marshall v. Rutton*, 8 Term 547. That case, decided in 1809, was twice argued, and the opinion was by Lord Chief Justice KENTON. The point at issue was whether, by any agreement between a man and his wife, she might be made legally responsible for the contracts she entered into, and be liable to the actions of those who trusted to her engagements as if she were sole and unmarried. The wife lived apart from her husband, and had a separate estate secured by deed. The conclusion was that she could not be held liable. The general principle that a *feme covert* could not, at common law, be holden on her contracts is so familiar and so well settled that any citation of authorities would be superfluous. It is to be noticed, however, that her contract was not merely voidable, but was absolutely void, so that it was not subject to ratification upon her becoming *discoverit*: 2 Black. Com. 293; *Robinson v. Robinson*, 11 Bush (Ky.) 174 (1874); *Quinn's Appeal*, 86 Penna. St. 447, 453 (1878); *Glidden v. Strupler*, 52 Id. 400 (1866); *Wooden v. Wampler*, 69 Ind. 90 (1879). A married woman had no power to contract, because her will

was supposed to be no longer free, but subject to the constraint of her husband. Marriage placed her *sub potestate viri*, and her power to contract was therefore suspended. Moreover, there was no fund out of which her liabilities could be satisfied, as all her personality became vested in the husband, and he was entitled to the rents and profits of her realty, and had an estate by the curtesy in her lands after her death. No matter what her representations might have been, she was never estopped from setting up her coverture as a defence in an action sounding in contract: *Oglesby Coal Co. v. Pasco*, 79 Ill. 164 (1875). And see Bigelow on Estoppel 490. But the defence of coverture was always personal: *Ricketson v. Giles*, 91 Ill. 154 (1878). Moreover, her incapacity to contract a personal obligation could not be overcome by any form of acknowledgment or mode of execution, or by uniting with her husband in the contract. See *Bank v. Partee*, 99 U. S. 325, 330 (1880).

Nevertheless, there were special cases in which this disability did not exist, she being compelled from necessity to act as a *feme sole*, as when her husband was imprisoned for life, or for years, or had been exiled, or had fled the country. The *feme* was then considered in a state of widowhood, and her husband as being civilly dead and her disability as at an end: *Co. Lit.* 132, a; *Walford v. Duchess de Pienne*, 2 Esp. 554 (1785); *Newsome v. Bowyer*, 3 P. Wms. 37 (1729); *Bank v. Partee*, *supra*; *Rhea v. Rhenner*, 1 Peters 105 (1828). And the right of a married woman to contract after she has been abandoned by her husband has been held in a number of cases in this country: *Gregory v. Paul*,

15 Mass. 31 (1818); *Gregory v. Pierce*, 4 Met. 478 (1842); *Love v. Moynahan*, 16 Ill. 277 (1854); *Prescott v. Fisher*, 22 Id. 390 (1859); *Anderson v. Jacobson*, 66 Id. 524 (1873); *Bean v. Morgan*, 4 McCord (S. C.) 148 (1827); *Hannon v. Madden*, 10 Bush (Ky.) 666 (1874); *Carothers v. McNese*, 43 Tex. 221, 224 (1875); *Zimbleman v. Robb*, 53 Id. 280 (1880).

This right is secured by statute in some of the states, as in Pennsylvania. In that state it is held not to be necessary that there should be a formal decree of court that a wife is to be regarded as a *feme sole* trader to enable her to contract. The right is said to result from proof that she has been thrown upon her own resources for support, and that her husband has deserted her or has neglected to provide for her: *Conley v. Bentley*, 87 Penna. St. 40, 48 (1878); *Black v. Tricker*, 59 Id. 13 (1868). In Kentucky, where the statute provides that she may be empowered by decree of court to act as a *feme sole* under certain circumstances, the statute is held to be a substitute for the common law: *Hannon v. Madden*, *supra*.

There exists, then, a distinction between desertions and separations. When there is an absolute desertion, and the wife is abandoned and left to her own resources, she is held to have the right to contract as a *feme sole*. But when there is a separation by agreement, and the wife has a separate estate secured to her by deed, then as was held in *Marshall v. Rutton*, *supra*, she has no right to contract. That case has never been overruled in England, and has been recognised in this country as laying down the true principle. See *Parker's Ex'r v. Lambert's Admr's*, 31 Ala. 89 (1857); *Beach v. Beach*, 2 Hill (N. Y.) 260 (1842); *Ayer v. Warren*, 47 Me. 217 (1859). It is possible that there may be cases of separation by agreement, with separate estate by deed, in which a married woman has the right to

contract. Such a right has been claimed to exist notwithstanding *Marshall v. Rutton*. For instance, Mr. Dane, in his Abr., pp. 335, 339, says: "Now, upon close examination, it will be found that in *Rutton's case*, and in every case in which the decision has been against this separate liability of the wife, there has existed one or both of these defects in the articles of separation. Either her separate maintenance has been clearly inadequate, and a mere fraud upon her, or not effectually, or not permanently secured to her, or her husband has retained some right at some time to seize her person, or to claim it with her society, and of course her services. In either case the reason of her liability fails." Again, he says, "On examining the cases carefully, it will be found she cannot be sued, though living separate, when her husband has not renounced his right to her person. And that she may be sued alone when he has renounced this right, and she may bind herself, so as to be sued alone on her contracts, whenever his marital rights are not affected by them, and there is no coercion." And in *Ayer v. Warren*, 47 Me. 217, 228 (1859), TENNEY, C. J., concedes this distinction to be well taken, and expresses it as his opinion that no English case can be found denying to the wife the power to bind herself by contract when an effectual renunciation of marital rights is shown.

The statutes which have been passed in most, if not in all, of the states, creating what is known as a married woman's statutory separate estate, have generally been construed as conferring upon her a right to contract, but only in reference to such estates, the right being limited and not general: *West v. Laraway*, 28 Mich. 464 (1874); *Jenne v. Marble*, 37 Id. 319 (1877); *Stillwell v. Adams*, 29 Ark. 346 (1874); *Henry v. Blackburn*, 32 Id. 445 (1877); *Alexander v. Bouton*, 55 Cal. 15 (1880); *Thomas v. Passage*, 54 Ind. 106 (1876);

Pippen v. Wesson, 74 N. C. 444 (1876); *Rhodes v. Gibbs*, 39 Texas 432 (1873); *Jones v. Crosthwaite*, 17 Iowa 393 (1864); *Whitworth v. Carter*, 43 Miss. 61 (1870); *Carpenter v. Mitchell*, 50 Ill. 470 (1869); *Cookson v. Toole*, 59 Id. 520 (1871); *Armstrong v. Ross*, 20 N. J. Eq. 117 (1869); *Hayward v. Barker*, 52 Vt. 429 (1880).

So strictly was this power construed in Pennsylvania, that in an action against a married woman on a note given for money borrowed for the avowed purpose of improving her separate real estate, it was held that she was not liable unless it was shown that the money was actually applied to that object: *Heugh v. Jones*, 32 Penn. St. 432 (1859). See also *Shannon v. Shultz*, 87 Id. 484 (1878); *Schriffer v. Saum*, 81 Id. 385 (1876). And in a recent case in the same court, it was held that she could only charge her separate estate by contract where the contract was for necessary improvements and repairs, and that the necessity must be affirmatively shown: *Kuhns v. Turney*, 87 Penn. St. 497, 501 (1878). But in New York, in a late case, it was held that if the money was loaned in reliance upon her representations that it was to be applied for the benefit of her separate estate, it was immaterial that the money was not in fact so applied: *McVey v. Cantrell*, 70 N. Y. 295 (1877). A question has been raised as to the power of a married woman to bind herself under these statutes for the purchase of real estate. In some cases it has been held that she cannot bind herself by such an agreement: *Robinson v. Robinson*, 11 Bush (Ky.) 174 (1874); *Carpenter v. Mitchell*, 50 Ill. 471 (1869). In *Marberger v. Spohn*, 9 Phil. 612, the ruling was that she could not buy real estate on credit, she having no separate property. On the other hand, it has been held that she may buy real estate on credit, and that it is immaterial whether she has a separate estate or not: *Cashman v. Henry*, 75

N. Y. 103 (1878); *Dayton v. Walsh*, 47 Wis. 113, 119, 120 (1879). See *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. 504; s. c., 28 Id. 275.

Her right to become a surety has been denied in some of the states and conceded in others. It is denied in the following cases: *Russell v. Peoples' Savings Bank*, 39 Mich. 671 (1878); *Jenne v. Marble*, 37 Id. 319 (1877); *DeVries v. Conklin*, 22 Id. 255 (1871); *Hyner v. Dickinson*, 32 Ark. 780 (1878); *Smith v. Williams*, 43 Conn. 409, 418 (1876); *Wolff v. Van Metre*, 19 Iowa 134 (1865); *Van Metre v. Wolf*, 27 Id. 341 (1869); *Veal v. Hurt*, 63 Ga. 730 (1879); *Saulsbury v. Weaver*, 59 Id. 254 (1877); *Kohn v. Russell*, 91 Ill. 138 (1878); *Doyle v. Kelly*, 75 Id. 574 (1874); *Athol Machine Co. v. Fuller*, 107 Mass. 437 (1871); *Williams v. Haycard*, 117 Id. 532 (1875). In Louisiana, a married woman is prohibited from becoming a surety for her husband, or binding her property for his debts: *Claverie v. Gerodias*, 30 La. Ann. 291 (1878). In New Jersey, a married woman cannot bind her separate estate except by a mortgage acknowledged as required by law, or for debts contracted for the benefit of her separate estate, or for her own benefit on the credit of it: *Perkins v. Elliott*, 22 N. J. Eq. 128 (1871). An accommodation note is not binding: *Peake v. LeBaro*, 21 Id. 269 (1871). And in Texas, a married woman is not liable on her note unless it was given for her separate property: *Wallace v. Finberg*, 46 Tex. 35 (1876); *Snow v. Mather*, 52 Id. 650 (1880). In the following cases it has been held that she may bind herself as surety: *Williams v. Urmston*, 35 Ohio St. 304 (1880); *Mayo v. Hutchinson*, 57 Me. 546 (1870); *Jarman v. Wilkerson*, 7 B. Mon. 293 (1847); *Burnett v. Hawpe*, 25 Gratt. 481 (1874). The principal case shows such contract would be binding in Missouri. It would also be binding in Minnesota, Colorado,

Wisconsin, in Illinois since 1874, and in Massachusetts since 1874. See *North-western Mutual Life Ins. Co. v. Allis*, 23 Minn. 337 (1877); *Wells v. Caywood*, 3 Col. 493 (1877); *Beard v. Dedolph*, 29 Wis. 136 (1871); *Taylor v. Boardman*, 92 Ill. 568 (1879); *Major v. Holmes*, 124 Mass. 108 (1878).

Her right to mortgage her lands to secure a debt of her husband, has been generally conceded: *Ferdon v. Müller*, 34 N. J. Eq. 10 (1881); *Mebane v. Mebane*, 80 N. C. 34; *O'Hara v. Baum*, 88 Penn. St. 114 (1878); *Rhodes v. Gibbs*, 39 Tex. 432 (1873); *Layman v. Schultz*, 60 Ind. 547 (1878); *Kerchner v. Kempton*, 47 Md. 568; *Malloy v. Clapp*, 2 Lea (Tenn.) 586 (1879); *Hobson v. Hobson*, 8 Bush (Ky.) 666 (1871); *Putton v. Kinsman*, 17 Iowa 428 (1864); *Smith v. Osborn*, 33 Mich. 410 (1876); *Scott v. Ward*, 35 Ark. 480 (1880). It is prohibited in Georgia: *Dunbar v. Mize*, 53 Ga. 435 (1874). Also in Alabama: *Bibb v. Pope*, 43 Ala. 190 (1869); *Mitchell v. Lippincott*, 2 Wood 467 (1874). In Illinois, she cannot mortgage her realty to secure a pre-existing debt of her husband: *Wilhelm v. Schmidt*, 84 Ill. 183 (1876).

In consequence of the common-law principles, already noticed, vesting a married woman's property in her husband, the practice grew up of vesting the legal title in a trustee, so that her property might be enjoyed by her, free from all control of her husband. In equity she became entitled to the beneficial interest in property so vested, and could control it by sale or otherwise. In *Peacock v. Monk*, 2 Vesey 190 (1750), it was settled that a *feme covert* acting with respect to her separate property was in equity competent to act in all respects as if she was a *feme sole*. The next question was whether her general personal engagements bound her separate estate, she not having made them a direct charge upon the estate. This question was settled in England in the famous

case of *Hulme v. Tenant*, 1 Bro. C. C. 16 (1778); s. c. 2 Dick. 560, Reg. Lib. 1778. The conclusion reached was that such engagements did bind the estate. And it was afterwards determined that these engagements need not be in writing. See *Murray v. Burlee*, 3 Myl. & K. 209 (1834); *Matthewman's Case*, L. R., 3 Eq. 787 (1866).

The question of whether a *feme covert* *cestui que trust* could dispose of her beneficial interest in the trust property in all cases where she was not in terms restrained from doing so, by the instrument creating the trust, has been the subject of much discussion. It has been contended on the one hand that when the instrument of trust declared a particular mode in which she might dispose of the estate her power was limited to that mode in exclusion of any and all others. That instead of the wife's being a *feme sole*, to all intents and purposes, as to her separate property, she was only to be deemed a *feme sole*, *sub modo*, or to the extent of the power clearly given by the settlement. On the other hand, it has been contended that, unless expressly restrained in the instrument of trust, she has full power to dispose of the estate, and that the setting forth a particular mode of disposition did not necessarily restrict her to that mode in exclusion of others. This last is known as the English rule. The cases by which this rule became established in England are collected and ably reviewed by Mr. Justice BREES in his separate opinion in *Scrift v. Castle*, 23 Ill. 209 (1859). His conclusion was that there were only two or three well considered English cases interrupting the current of decisions in that country, in favor of the rule, from the time of Lord MACCLESFIELD in 1740. This rule was opposed by the decisions of Sir PEPPER ARDEN and Lord LOUGHBOROUGH in *Sorkett v. Wray*, 4 Bro. C. C. 485 (1793), in *Whistler v. Newman*, 4 Vesey 129 (1798), and in *Mores v. Huish*, 5 Id. 692 (1800). But these

cases were not followed by any of their successors, neither by *HARDWICKE*, *TALBOT*, *THURLOW* or *ELDON*. "Sir *PEPPER ARDEN* cast into it (the current of decisions) one small pebble, followed by Lord *LOUGHBOROUGH* with two of larger size, but they failed to impede its force." The English rule has been recognised in many of the states.

ARKANSAS: See *Collins v. Wassell*, 34 Ark. 17, 34 (1879).

CALIFORNIA: See *Selover v. Am. Russ. Com. Co.*, 7 Cal. 266, 274 (1857); *Racouillat v. Sansevain*, 32 Cal. 376, 384 (1867).

CONNECTICUT: See *Imlay v. Huntington*, 20 Conn. 146 (1849).

KENTUCKY: See *Bell v. Kellar*, 13 B. Monr. 381 (1852); *Kelly v. Kelly*, 5 Id. 369 (1845); *Jarman v. Wilkerson*, 7 Id. 293 (1847).

MISSOURI: See *Whitesides v. Cannon*, 23 Mo. 457 (1856); *Kimra v. Weippert*, 46 Id. 532, 536 (1870).

NEW JERSEY: See *Leacycraft v. Had-den*, 3 Green Ch. 512 (1845); *Perkins v. Elliott*, 23 N. J. Eq. 526, 531 (1872).

NEW YORK: See *Jaques v. Methodist Epis. Church*, 17 Johns. 548 (1820); *Dyett v. N. A. Coal Co.*, 20 Wend. 570, 573 (1838); *Albany Ins. Co. v. Bay*, 4 N. Y. 9 (1850); *Wadham v. The Society*, 12 Id. 415 (1855).

VERMONT: See *Frary v. Booth*, 37 Vt. 78, 86 (1864); *Dale v. Robinson*, 51 Vt. 20, 26 (1878).

VIRGINIA: See *Frank v. Lilienfeld*, 33 Gratt. 377, 395 (1880), and cases there cited.

WEST VIRGINIA: See *Radford v. Carville*, 13 W. Va. 572 (1878); *Weinberg v. Rempe*, 15 Id. 831 (1879).

WISCONSIN: See *Todd v. Lee*, 15 Wis. 365.

On the other hand, it has been held that the contrary doctrine is the more correct, and that she can only dispose of the estate in the mode pointed out in the declaration of trust.

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GEORGIA: See *Weeks v. Sego*, 9 Ga. 199, 203 (1850).

ILLINOIS: See *Swift v. Castle*, 23 Ill. 209 (1859); *Conkling v. Dougl.*, 67 Id. 355 (1873).

MARYLAND: See *Tarr v. Williams*, 4 Md. Ch. 68 (1853); *Williams v. Donaldson*, 4 Id. 414 (1849); *Miller v. Williamson*, 5 Md. 219 (1853); *Cooke v. Husbands*, 11 Id. 492, 503 (1858).

MISSISSIPPI: See *Doty v. Mitchell*, 9 S. & M. 435, 447 (1848); *Montgomery v. Agricultural Bank*, 10 Id. 567, 576 (1848).

NORTH CAROLINA: See *Hardy v. Holly*, 84 N. C. 667 (1881); overruling *Frazier v. Brownlow*, 3 Ired. Eq. 237 (1844), and *Harris v. Harris*, 7 Id. 111 (1850).

PENNSYLVANIA: See *Maurer's Appeal*, 86 Penn. St. 384 (1878); *Lancaster v. Dolan*, 1 Rawls 231, 248 (1829); *Lyne's Ex'r. v. Crouse*, 1 Penn. St. 111 (1845); *Rogers v. Smith*, 4 Id. 93, 98 (1846).

RHODE ISLAND: See *Metcalf v. Cook*, 2 R. I. 355 (1852). But see *Elliott v. Gower*, 12 Id. 80, 81 (1880).

SOUTH CAROLINA: See *Eving v. Smith*, 3 Dess. 417 (1811); *Maywood v. Johnston*, 1 Hill Ch. 228, 230 (1833); *Robinson v. Executors of Dart*, Dud. Eq. 128, 131 (1838); *Clark v. Makenna*, Cheeve's Eq. 163 (1840); *Reid v. Lamar*, 1 Strob. Eq. 27, 37 (1845).

TENNESSEE: See *Morgan v. Elam*, 12 Tenn. 375 (1833); *Marshall v. Stephens*, 27 Id. 159 (1847); *Ware v. Sharp*, 31 Id. 489 (1852); *Kirby v. Miller*, 44 Id. 4 (1867).

But the principle that the general engagements of a married woman could be enforced in equity against her separate estate, although not made a specific charge upon it by her—a principle settled in England, as we have seen in *Hulme v. Tenant*—has not been favorably received in the American courts. It has been held in the following cases that

her general liabilities cannot be satisfied out of the separate estate, unless she has expressly charged her estate with them: *Kirby v. Miller*, 44 Tenn. 4 (1867); *Dale v. Robinson*, 51 Vt. 20, 27 (1878); *Willard v. Eastham*, 15 Gray 328 (1860); *Williams v. Hugunin*, 69 Ill. 214 (1873); *Furness v. McGovern*, 78 Id. 338 (1875); *Yale v. Dederer*, 18 N. Y. 265 (1858); s. c. 22 N. Y. 450 (1860); *Knox v. Jordan*, 5 Jones Eq. 175 (1859); *Pippen v. Wesson*, 74 N. C. 442 (1876); *Wilson v. Jones*, 46 Md. 357 (1876); *Athol Machine Co. v. Fuller*, 107 Mass. 437 (1871); *Wolff v. Van Metre*, 19 Iowa 134 (1865); *Eisenlord v. Snyder*, 71 N. Y. 45 (1877).

In opposition to the above cases, it has been held that the intent to charge her separate estate will be inferred from the mere execution of a note: *Burnett v. Haupe*, 25 Gratt. 481 (1874); *Darnall v. Smith*, 26 Id. 878 (1875); *Garland v. Pamplin*, 32 Id. 305 (1879); *Williams v. Urmston*, 35 Ohio St. 304 (1880); *Burnley v. Thomas*, 63 Mo. 390 (1876); *Metropolitan Bank v. Taylor*, 62 Mo. 338 (1876); *Deering v. Boyle*, 8 Kans. 530 (1871); *Jarman v. Wilkerson*, 7 B. Mon. 293 (1847); *Whitesides v. Cannon*, 23 Mo. 457 (1856).

The courts in New York have gone further than the courts of other states in holding that the intent must be declared in the very contract which is the foundation of the charge: *Yale v. Dederer*, *supra*; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. (App'x) 613 (1870); *Eisenlord v. Snyder*, 71 Id. 45 (1877). See *Treadwell v. Archer*, 76 Id. 196 (1879).

When the liability was incurred for the benefit of her separate estate, it is not necessary that she should have specifically charged her estate with it. It will be enforced in equity, and she will be presumed to have intended that the separate estate should be charged with it: *Wuthers v. Sparrow*, 66 N. C. 129 (1872); *Caldwell v. Sawyer*, 30 Ala.

283 (1857); *Wells v. Thorman*, 37 Conn. 318 (1870); *Henry v. Blackburn*, 32 Ark. 450 (1877); *Dobbin v. Hubbard*, 17 Id. 194 (1856); *Pentz v. Simonson*, 13 N. J. Ch. 232 (1861); *Homœopathic Mutual Life Ins. Co. v. Marshall*, 32 N. J. Eq. 103, 112 (1880); *Shacklett v. Polk*, 3 Heisk. 122 (871); *Williams v. King*, 43 Conn. 569 (1876); *McVey v. Cantrell*, 70 N. Y. 295 (1877).

As is stated in the principal case, a *feme. covert's* liability was never personal: *Frank v. Lilienfeld*, 33 Gratt. 377, 397 (1880); *Henry v. Blackburn*, *supra*; *Terry v. Hammonds*, 47 Cal. 32 (1873). And a judgment against her was void, even when rendered upon confession: *Quinn's Appeal*, 86 Penn. St. 447, 453 (1878); *Morse v. Tappan*, 3 Gray 411 (1855); *Norton v. Meader*, 4 Sawyer 620, 624 (1866); *Griffith v. Clarke*, 18 Md. 457 (1862); *Bank v. Partee*, 99 U. S. 325 (1878). And in *Weil v. Simmons*, 66 Mo. 617 (1877), it was held to make no difference that she was sued as a member of a mercantile firm. But when the law confers upon her capacity to contract in certain cases, it clothes her, as a logical consequence, with whatever capacity is necessary to give a full remedy to the party with whom she contracts. In such cases, she has the *persona standi in judicis*, and a judgment confessed by her would be binding: *Swayne v. Lyon*, 67 Penn. St. 436 (1871); *Van Metre v. Wolf*, 27 Iowa 341 (1869).

And as is also stated in the principal case, her liability is not a lien upon the separate estate until made so by decree: *Armstrong v. Ross*, 20 N. J. Eq. 119 (1869); *Frank v. Lilienfeld*, 33 Gratt. 377, 397 (1880).

Equity did not decree that satisfaction should be had out of the *corpus* of the real estate, but only out of the personality and out of the rents and profits of the realty: *Weinberg v. Rempe*, 15 W. Va. 831, 860 (1879); *Radford v. Carwile*,

13 Id. 572 (1878); *Cox v. Wood*, 20 Ind. 54 (1863); *Pulmer v. Rankins*, 30 Ark. 771 (1875); *Henry v. Blackburn*, 32 Id. 452 (1877); *Lewis v. Yale*, 4 Fla. 418, 424 (1852); *Frank v. Lilienfeld*, 33 Gratt. 377, 395 (1880); *Hulme v. Tenant*, 1 Bro. C. C. 20 (1778). But it seems that the real estate may be sold if necessary to discharge the obligation: *Whitesides v. Cannon*, 23 Mo. 457 (1856); *Tiernan v. Poor*, 1 G. & J. (Md.) 217 (1829); *Yale v. Dederer*, 21 Barb. 290 (1855); *Dale v. Robinson*, 51 Vt. 20 (1878).

Upon the death of a *feme covert* having a separate estate not disposed of by her will, the personalty goes to the husband as her administrator: *Proudley v. Fielder*, 2 My. & K. 57 (1833); *Molony v. Kennedy*, 10 Sim. 254 (1839); *Johnstone v. Lumb*, 15 Id. 308 (1846); *Musters v. Wright*, 2 De G. & Sm. 777 (1848). But undisposed of real estate goes to the heir, subject to the husband's right as tenant by the curtesy: *Roberts v. Dixwell*, 1 Atk. 607 (1738); *Pitt v. Jackson*, 2 Bro. C. C. 51 (1786); *Fol-*

lett v. Tyrer, 14 Sim. 125 (1844); *Harris v. Mott*, 14 Beav. 169 (1851); *Appleton v. Rowley*, L. R., 8 Eq. 139 (1869); *Dale v. Robinson*, 51 Vt. 20, 26, 31 (1878).

The conclusion of the court in the principal case is that the general creditors are to be paid out of the assets of the general estate, to the exclusion of the special creditor. No question can be raised as to the correctness of this conclusion. But when the court goes on to say that if the assets of the general estate are insufficient to satisfy such creditor, he may come in and share *pro rata* in the separate estate with the special creditor, there may be reason for asking why the equity should not be recognised to its full extent, and the general creditor be postponed to the special creditor, and only allowed to share in whatever remains of the separate estate after the special creditor has been paid. Otherwise, the general creditor gains an undue advantage, and the special creditor loses a corresponding advantage, by reason of the death of the *feme covert*.

HENRY WADE ROGERS.

Supreme Court of Pennsylvania.

A. H. VANHORN v. JOHN GILBOUGH ET AL.

A general custom that a broker may pledge his customer's stock for the purpose of raising money to carry it, is valid.

When the market value of stock so pledged falls below a price that will reimburse the broker for all expenses, a custom of brokers to sell out the customer's stock without notice, and hold the latter liable for the loss, is valid.

Aside from any usage, the admission of the customer that he never intended to pay for, and take up the stock, estops him from complaining of want of notice, or informality in the giving of notice.

ERROR to the Common Pleas of Luzerne county.

Assumpsit by Gilbough, Bond & Co. against A. H. Van Horn.

The cause was referred to Hon. Henry M. Hoyt as referee, whose finding of facts and of law was as follows:—

1. In May 1872, the defendant, through Thomas Wilson,

directed the plaintiffs, Gilbough, Bond & Co., a firm of brokers in Philadelphia, to purchase for him at the market price three hundred shares of the capital stock of the Philadelphia and Reading Railroad Company. The plaintiffs immediately made the purchase at \$58 $\frac{1}{2}$ per share, that being the market price, and the stock was delivered to them on the same day, or the day following. The defendant paid \$1500 on account, and the plaintiffs raised the balance for defendant, by a pledge of the stock as collateral, and they duly rendered him a statement, showing a balance against him, 31st May 1872, of \$16,254.75. That the stock would be retained as collateral to the balance due, was understood by defendant at the time of purchase. Plaintiffs, in order longer to carry the stock for defendant, paid the interest and the usual broker's commissions, as cost of carrying the same, and charged such cost against the defendant.

2. That where stock is only partially paid for by party ordering its purchase, it was and is the custom of brokers to use the stock as collateral to raise money to carry the same for the customer, and the custom was known to Thomas Wilson at the time he ordered the purchase for the defendant.

3. That whenever the market value of the stock falls below a price that will fully reimburse the broker for all outlays and expenses, it is the custom between brokers, as well as between brokers and their customers, to sell the latter's stock at the stock exchange without notice, and hold the customer for the loss; this custom being likewise known to Mr. Wilson.

4. That plaintiffs, by letter dated September 23d 1873, gave notice to defendant to take up by twelve M. next day the stock already pledged by them as collateral, and advise them by telegraph.

Again by letter on the 8th October they notified defendant to pay for and take up the stock. No answer was ever sent nor any attention paid by the defendant to either of these letters.

5. That on the 22d day of September 1873, the parties to whom the same were pledged sold out two hundred shares of the defendant's stock at the Stock Exchange, Philadelphia, at \$48 per share, and on the 18th of October, the remaining one hundred shares at \$50 $\frac{1}{2}$, the loss of price being borne by plaintiffs; that the prices received were the market prices of the stock on the respective days of sale, and that between those dates the market

price dropped as low as \$45; that the highest price attained since the last sale of defendant's stock was \$59 per share, 27th of March 1874, and its market value at time of trial was about \$15 per share.

6. That notwithstanding the sale of the two hundred shares, the plaintiffs, at any time up to the 18th of October (ten days after the last notification to defendant to take up his stock), were able and willing to deliver to defendant three hundred shares of Philadelphia and Reading stock on payment of balance due by him.

7. Notice that the stock had been sold was promptly sent to and received by the defendant, to which he paid no attention; and from the time of purchase, in May 1872, down to the 1st of January 1874, statements in detail of the accounts between the parties were at regular intervals of about thirty days sent to and received by defendant. These statements, taken together, show a purchase of the stock and its price; the charges of interest and commission, and \$75 extra interest as cost of carrying the stock; the credit of dividends received; the sale of two hundred shares September 22d 1873, at \$48, and one hundred shares October 18th, at \$50½, and that the balance claimed by plaintiffs the 1st of January 1874 was \$1389.41.

8. That each statement of the account received by the defendant contained the request: "Please examine and report on this account as soon as convenient," but down to the time of trial the defendant never objected to the account as stated, nor to the sale of stock as made. He never demanded the stock, nor offered to pay for it and take it up, and in fact admits, when sworn in his own behalf, that he did not at any time intend to pay for it and take it up in case it declined in price.

Are the plaintiffs entitled to recover on the facts as found? The stock having actually been bought in for the defendant, and the certificates delivered to the plaintiffs, the transaction was legitimate so far as they were concerned, and was not a gambling transaction, notwithstanding the defendant on his part did not intend to pay for and take up the stock so purchased: *Smith v. Bouvier*, 20 P. F. Smith 325; *Maxton v. Gheen*, 25 Id. 166. Other questions, however, are raised affecting the right of recovery.

1. Did the defendant have actual previous notice of the sales?

Of course, the letter of 23d September was not notice of an intended sale on the 22d, for that had already occurred, and the

letter of the 8th October, as a mere notice of sale was defective in not naming the time and place.

2. Are the customs noted in the second and third conclusions of fact valid and binding upon the defendant?

They will be considered separately.

I can perceive no real objection to the validity of a general usage that a broker may use his customer's stock as collateral to carry it for the customer. Such usage contravenes no statute or principle of public policy. The customer can, of course, avoid all trouble in this respect by paying for his stock in full; but where, as here, he only pays a small percentage of its value, while his agent, the broker, must provide for the balance, it would not seem unreasonable, that the broker should for that purpose pledge it as collateral. Knowledge of this custom on the part of Mr. Wilson, who ordered plaintiffs to purchase the stock for defendant, is to be imputed to the defendant himself. I, therefore, regard it as within the known terms and scope of the broker's agency, and that they had authority not only to purchase the stock, but to deal with it in the manner they did in order to carry it for the defendant.

As to the custom to sell without notice, under the circumstances mentioned in the third finding of fact, I assume that if good against the plaintiffs it was binding upon the defendant their principal. I am not unmindful of the general rule of law that a sale of collateral should be upon notice of time and place of sale, but, as said by Judge MITCHELL in *Colket v. Ellis*, 10 Phila. 375, this is a privilege that may be waived, and the waiver be evidenced as well by a custom known to and acquiesced in by the parties as by express contract. The custom was known both to Mr. Wilson and the plaintiffs. There was then at least constructive notice of sale to them, and constructive notice to a servant is held to be notice to his principal: *Whitesell v. Crane*, 8 W. & S. 373. As between the plaintiffs and the actual holders of the pledge, the sale was undoubtedly sanctioned by the custom. It bound the plaintiffs (themselves brokers) and through them, as I believe, their principal, this defendant; for if correct in the view already expressed that they had authority under the circumstances to make the pledge, the latter was subject to the incident of sale in pursuance of the custom. I, therefore, hold both customs valid and lawful and binding on both parties.

3. Aside from these customs, however, and even conceding that

they do not vary the general rule already stated so as to affect the defendant, I am of the opinion that, since the defendant by his own admission never intended to pay for and take up the stock, he did not act in good faith, and is estopped from complaining of want of notice of sale or any other formality in connection with it. The very object of notice is to enable a party to come forward, pay up and prevent the sacrifice of the pledge, but when he says he would not have availed himself of such notice, nor have interfered to protect the stock by paying the amount he still owed upon it, of what advantage would it have been to him to have had notice, or how has he been harmed by the want of it?

The stock was not sold below the market price, and under no circumstances could it be expected to bring more if he himself was unwilling to interfere. The result to the defendant was, therefore, as favorable as if he had the fullest notice of the intended sale.

4. Independently of any of the foregoing considerations there are further reasons sufficient in my judgment to entitle the plaintiffs to recover in this action.

The failure of the defendant to object to the sale, within a reasonable time after receiving notice, I believe amounts to an implied ratification: see *Kelsey v. Bank of Crawford Co.*, 19 P. F. Smith 426. And the statements in evidence giving an account of sales, and particularly the balance claimed as due the plaintiffs 1st January 1874, not being objected to within a reasonable time, constitute an account stated between the parties: *Bevan v. Cullen*, 7 Barr 281; *Porter v. Patterson*, 3 Harris 229.

What is reasonable time can only be determined upon the special circumstances of each case, as is well illustrated in the opinion delivered in *Colket v. Ellis*, already cited.

The financial panic of 1873 was almost unprecedented, and parties were bound to act without unnecessary delay.

For nearly a month after the sale of the two hundred shares, the plaintiffs were still in a position to furnish the defendant the whole number of shares. The propriety and necessity of his acting with reasonable promptness if he objected to the sale as made is obvious, for there was still time for the plaintiffs to correct the error, if one had been committed. From the failure of the defendant to object to what had been done, the plaintiffs might reasonably infer that he acquiesced, and after the lapse of years it is altogether too late to make the objection at the trial. Treating the account rendered

1st January 1874 as an account stated, I am of the opinion that the plaintiffs' use party is entitled to recover the amount shown due by said account, notwithstanding it includes a charge of \$75 extra interest, such extra interest, as well as the other charges, being for actual disbursements on part of plaintiffs in defendant's behalf.

Judgment should, therefore, be entered at this time against defendant for the sum of \$1759, being the amount due 1st January 1874, with interest to this date.

The defendant filed numerous exceptions to the findings of the referee, which were dismissed by the court, and the report confirmed. The defendant thereupon took this writ, assigning for error the dismissal of his exceptions.

W. L. McLean, for plaintiffs in error.

George R. Bedford, for defendant in error.

The opinion of the court was delivered by

SHARSWOOD, C. J.—Upon the facts, as found by the referee in the court below, we think the conclusion at which he arrived was entirely right.

Judgment affirmed.

It is proposed to consider in this note the effect of stock-exchange usages upon non-members of that body dealing through its members.

The subject has claimed the attention of the English courts in many well-considered cases during the past fifty years, but the American authorities are few.

It had been previously decided in Pennsylvania, in *Colket v. Ellis*, 10 Phila. 375, that a custom to sell stock pledged as collateral without notice was valid and lawful, between plaintiffs and defendants, both members of the board of brokers, and presumably having knowledge of its usages. It was expressly stated, however, by the judge who delivered the opinion, that he was not to be understood as intimating what would be the effect if such a usage was set up against an outside party.

The principal case, therefore, is the first that has arisen in this state upon the effect of such a usage upon an outsider.

The English decisions should perhaps be first considered. It was decided by the courts of that country, as early as 1839, that a person who employs a broker must be supposed to give him all authority to act as other brokers do, and it is quite immaterial whether or not he himself is acquainted with the rules by which brokers are governed: *Sutton v. Tatham*, 10 Ad. & E. 27; *Mitchell v. Newhall*, 15 M. & W. 308; *Bayliffe v. Butterworth*, 17 L. J., Ex. 78.

In *Bayley v. Wilkins*, 18 L. J., C. P. 273, COLTMAN, J., remarked that he could see no reason for doubting that a person who goes into the stock exchange to buy railway or other stock, must be

taken to have a knowledge of the usual course of business there. But in *Westropp v. Solomon*, 8 C. B. 345, a resolution of the exchange, passed after the employment of the broker had begun, was held not binding upon the customer.

Coles v. Bristowe, L. R., 4 Ch. Ap. 3, went a step further, in holding that no private instructions given to the broker by a customer could limit the general authority which, by employing him to sell on the stock exchange he gave him, to sell according to the usage of the exchange; and hence that the general custom of the exchange must furnish the rule by which the contract of the parties was to be interpreted. To the same effect is *Grissell v. Bristowe*, L. R., 4 C. P. 36.

The rule was pushed still further in *Maxted v. Paine*, L. R., 6 Ex. 132, where the principal was compelled to accept as a purchaser an entirely irresponsible person, to whom objection had not been made within the time required by the rules. The doctrine was so far modified, however, in *Duncan v. Hill*, L. R., 8 Ex. 248, as to provide that, while a principal who employs a broker undoubtedly authorizes the latter to bind him (the principal) according to the rules and usages of the stock exchange, he does not enter into any obligation to be answerable for the liability which has arisen by reason of his agent's insolvency. The recent case of *Robinson v. Mollett*, L. R., 7 H. L. 802, imposed a still further limitation upon the doctrine, namely, that, in order to bind an outsider, the usage set up must be only such an one as relates to the mode of performing the contract, and does not change its intrinsic character.

The following propositions seem to be conclusively settled in England:

1. That the usages of the stock exchange bind the members of that body, and those contracting through them, provided (a) such usages contravene no law of the land or public policy; (b) that

they relate to the mode of performance of the contract, and do not change its intrinsic character.

2. That the principal cannot modify his own liability by private instructions to his brokers.

3. That while the principal is bound by his broker's contracts, he is not liable for all the consequences of his insolvency.

In addition to the cases already cited, the following authorities serve to strengthen the propositions just laid down: *Hodgkinson v. Kelly*, L. J., 37 Ch. 837; *Nickalls v. Merry*, L. R., 7 Eng. & Irish Ap. Cases 530; *Sheppard v. Murphy*, L. R., 2 Eq. 569; *Bowring v. Shepherd*, L. R., 6 Q. B. 309; *Lacey v. Hill Crawley's Claim*, L. R., 18 Eq. 182; *Lacey v. Hill Scrimgeour's Claim*, L. R., 8 Ch. 921.

Turning now to the American decisions with which this note chiefly has to do, we find Mr. Justice FOLGER, in *Walls v. Bailey*, 49 N. Y. 473, making use of the following language: "There are cases, too, of principal and agent, where one has been set by another to do acts in a particular business, to be done at a particular locality, as on stock exchange, where a power to deal is a privilege obtained by payment of a fee, and is restricted to a body which has for its regulation and government come under certain prescribed rules or established usages, and as the agent could not do the will of his principal, nor could the principal himself, save in conformity with those rules and usages, it is held that the principal must be bound thereby, whether cognizant of them or not, and that ignorance will not excuse him."

This, however, must be regarded as the loosest sort of a dictum, in view of other New York cases subsequently decided.

In *Allen v. Dykers*, 3 Hill 593, the offer was to prove that it was the usage when stock was transferred to dealers by way of collateral security, not to

hold it specifically, but to transfer it by hypothecation, and on tender of the money advanced to return an equal quantity of the same kind, also that this usage was general and known to the agent, who made the loan in question. There was a written contract in this case. Plaintiff borrowed \$21,000 at sixty days, offering as collateral two hundred and fifty shares of certain stock, with authority to sell on non-payment at the board of brokers, "notice waived if not paid at maturity." The usage was held inadmissible, the court remarking that it was not necessary to determine what effect would be due to such proof in the case of a simple pledge as collateral security without any further agreement, but where, as in the present case, the terms and conditions were prescribed by the agreement, the parties were bound thereby, and proof of any general or particular usage must be excluded when in direct contradiction to the fair and legal import of a written contract.

In an action on a contract to deliver certain railroad stock, it was held that the plaintiff would not be permitted to prove that by the general custom of brokers and dealers in stocks in the city of New York, the words "dividends or surplus dividends" in the contract, were intended to mean dividends declared on the stock, whether they had been announced before or after the date of the contract, provided that on the day the contract was made the stock was selling in the market "dividend on" and not "ex-dividend;" for the reason that effect could not be given to the custom without making a new agreement between the parties: *Lombardo v. Case*, 45 Barb. 95.

As early as *Wheeler v. Newbold*, 16 N. Y. 392, it was decided that a local custom of the city of New York to sell stocks, &c., deposited as collateral, upon failure of the debtor to pay the principal debt, was unreasonable and void.

Whitehouse v. Moore, 13 Abb. Pr. 142, has sometimes been cited as establishing the contrary, but the case was really decided upon a point of pleading.

"If," say the court in *Taylor v. Ketchum*, 5 Rob. N. Y. 513, "the broker desires to possess himself of the power to sell the collateral, on failure to repay advances, without notice of time and place of sale, he must make an agreement that shall permit him to do so."

The familiar case of *Markham v. Jaudon*, 9 Am. Law Reg., N. S., 285 (41 N. Y. 235), decided that the purchase of stock on margin created the relation of pledgor and pledgee between broker and customer. Among the offers of testimony in that case was one to show a custom to sell without notice. In passing upon this offer, the Chief Justice observed, "The broker has no right to sell without notice. A practice or custom to do otherwise would have no more force than a custom to protest notes on the first day of grace, or a custom of brokers not to purchase the shares at all, but to content themselves with a memorandum or entry in their books of the contract made with their customer. Such practice in each case would be in hostility to the terms of the contract, an attempt to change its obligation, and would be void. The proof could not therefore be legally given."

While the New York courts have been firm in their refusal to admit evidence of usage to sell pledged stock without the formalities attaching to the sale of ordinary pledges, they have of late been disposed to give effect to any agreements of waiver of the right of notice: *Baker v. Drake*, 66 N. Y. 518; *Wicks v. Hatch*, 62 Id. 535; but that in the absence of a waiver a sale of collateral by a broker, without notice, amounts to a conversion has been reaffirmed in the latest cases: *Grouman v. Smith*, 36 Sickels 25.

So much for the law as to the sale of pledges. Other usages of brokers are

worthy of consideration. In *Shaw v. Spencer*, 100 Mass. 385, the defendant offered to show: 1. That it is a matter of common occurrence for certificates of stock to be issued in the name of some other person as trustee, when in fact there is not any trust. 2. Whether certificates of stock issued to a designated person as trustee are constantly bought and sold in the stock market, by a simple endorsement of the certificate, by the person named as the holder, without inquiry as to the authority by which, or to the use or purpose for which, the transfer was made. The former was excluded as having no legal bearing upon the case. As to the latter, FOSTER, J., remarked, "the circumstance that stock certificates issued in the name of one as trustee, and by him transferred in blank, are constantly bought and sold in the market without inquiry is likewise unavailing. A usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts."

In *Day v. Holmes*, 103 Mass. 306, the auditor found that there was a general and well-known usage among stock brokers in Boston, in filling orders for stock, deliverable at any time, at buyer's option, within a certain period, with interest at a sum not exceeding a certain price, to buy the stock for cash, or on a shorter time than ordered, in their own names, not disclosing the names of their principals, and to turn the same, as it is called, or carry it until the maturity of the contract, charging therefor a brokerage in addition to the usual commission for buying, as compensation for the risk of such carrying; that the amount of such extra brokerage differed with the different stocks, and with the length of time for which they were carried; that such usage was well known to persons dealing in stocks of the description in question, but that there was no evidence of actual knowledge by the defendant of such usage. The custom was held bad

as against sound policy and good morals. In an action brought to recover a sum of money alleged to be due as the first payment or margin, on a written contract to sell stock, by a member of the Board of Brokers, to be delivered to the buyer in thirty days: if the contract acknowledges the receipt of such first payment, the plaintiff would be allowed to give evidence of what the custom of the Board of Brokers was with regard to making and delivering such contracts, for the purpose of accounting for the delivery of the contract without receiving the money: *Winans v. Hassey*, 48 Cal. 634.

In *Marye v. Strouse*, 5 Fed. Rep. 486, recently decided, a custom was pleaded that frequently a number of telegrams would be sent to San Francisco in one dispatch. In such case the practice was to charge each customer having an order therein seventy-five cents, that being the proper charge for a single telegram of ten words, although such customer's proportion of the actual cost was often, if not always, much less. The only evidence as to the custom was in answer to the question whether this was a custom among the brokers, and was well known. The response was given, "I tell everybody, make no bones about it," and again, "It (the mode of charging) is well known; we don't make any bones about it; tell everybody." The court said that "this evidence showed that there was nothing clandestine about the charges, but does not show a certain and uniform custom among brokers, known to both parties. A custom or usage like this of charging customers, in addition to commissions, not merely the actual cost of telegrams, but an arbitrary sum, ordinarily much more than the actual cost, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should also appear that both parties had knowledge of it."

So a usage among brokers that the

margins put up to cover advances must be reasonable, is bad, in the absence of a rule being shown by which a reasonable margin can be determined: *Oelricks v. Forq*, 23 Howard 49.

Evans v. Waln, 21 P. F. Smith 69, is a well known case in Pennsylvania. The facts were substantially these: The plaintiffs being owners of certain shares of C. C. and I. C. stock, employed Markoe & Brother, brokers in Philadelphia, to sell them. The stock was sold by the defendants, brokers in New York, through the agency of one Wister, another broker in Philadelphia. Wister failed, in debt to defendants, while the proceeds of the sale of the stock were in their hands. In remitting the proceeds they withheld the amount of his indebtedness. The defendants offered to prove a custom of stockbrokers of one city, when dealing with those of other cities, to put all the transactions between them into one account, and to remit or draw for the general balance. The offer was refused by the court below, and in passing upon the question in the Supreme Court, Mr. Justice WILLIAMS said, "If there is a custom among stockbrokers, when dealing with others, to appropriate money belonging to the principal, to the payment of his broker's indebtedness, the sooner it is abolished the better. A custom so iniquitous can never obtain the force or sanction of law, and the marvel is that it should be set up as a defense to this action."

One more case remains to be noticed, reported in the latest volume of the New York reports. The plaintiff, a maiden lady, received by mail a circular purporting to be signed by defendant as stockbroker in New York, setting forth the great profits likely to ensue from speculating in stocks, and suggesting several methods of so doing. A "straddle," however, was recommended as by far the safest form of privilege, and the circular went on to say, "when the

selection of the stock is left to us we will guarantee that, in the stock we select, the fluctuations will aggregate at least eight per cent. on a sixty-day contract, costing \$400, and in case this does not occur we will guarantee no loss, except commissions."

Plaintiff accordingly wrote, enclosing the necessary amount, and directed the broker to invest in a sixty-day straddle contract. The broker selected Lake Shore & Michigan Southern Railroad as the stock, and so notified the plaintiff, adding that he would exercise his best judgment in closing at the most favorable time. On the following day, defendant (the broker) claimed that he sold one hundred shares short against the straddle, at the same price that it was bought for. He claimed to have done this in accordance with a custom among brokers to use a straddle in that way. The court ruled that this evidence was inadmissible, on the ground that the defendant, standing in the relation he did to the plaintiff, could not without her knowledge or consent, under any usage or custom not known to her, or with respect to which she has not contracted, make the short sale on her account, and thus depart from and work out a modification of the arrangement. And in affirming this ruling the Court of Appeals said that the fact that contracts for the use of a straddle in a manner different from that contemplated by the agreement, were more or less common, was wholly immaterial, and a custom or usage which binds the parties to a contract does so only upon the principle either that they have knowledge of its existence, or that it is so general that they must be supposed to have contracted with reference to it: *Harris v. Turnbridge*, 38 Sickels 92.

From the cases considered, which include it is believed all the American decisions, it will be observed that our courts have not looked with very great favor upon the usages of stockbrokers

and stock exchanges. Certain it is that we have not been willing to go to the length which the English courts have done.

The conservative policy is perhaps the better one, for as we have seen, the

English courts have of late years been obliged, for the protection of the principal, to put some restrictions upon the doctrines too broadly laid down in the earlier cases.

FRANCIS A. LEWIS, JR.

Supreme Court of Tennessee.

O'CONNOR v. CITY OF MEMPHIS.

The doctrine formerly accepted, that upon the civil death of a corporation, its real estate reverted to the original grantor, the debts due to and from it were extinguished and its personal property vested in the state, is no longer followed either in England or in this country.

The debts of a municipality are not extinguished by the repeal of its charter and the granting of a new charter to the same corporators, accompanied by the transfer to the new corporation of the municipal property.

Where, after the repeal of a municipal charter, the same people and the same territory are reincorporated as a municipality under a new name, although with different powers and different officers, a suit pending against the old corporation at the date of the repeal may be revived against the new corporation.

A provision in the statute granting the new charter, that the new corporation shall not pay or be liable to pay any debt created by the extinct corporation, impairs the obligation of contracts, and is therefore unconstitutional and void.

Whether in such case the legislature may withhold from the new corporation the taxing power as against debts contracted by the old corporation, not decided.

DEMURRER to *scire facias* to revive suit. The facts were as follows: By the Act of 1879, ch. 10, the legislature repealed certain charters of municipal corporations, and, among others, the charter of the city of Memphis. The repealing act contained no provision for the revivor of suits against any representative or successor of the city. By an act passed the same day, the several communities embraced in the territorial limits of the municipal corporations whose charters were thus abolished, were created taxing districts, "in order to provide the means of local government for the peace, safety and general welfare of such districts." The community embraced in the territorial limits of the city of Memphis became, by the act, the taxing district of Shelby county, and organized under it. The Supreme Court subsequently held, as the result, that the charter of the city of Memphis had been validly repealed, and that the same people and the same territory had been consti-

tutionally reincorporated as a municipality: *Luehrman v. Taxing District of Shelby County*, 2 Lea 425.

At the time of the passage of these acts, the present suit against the city of Memphis was pending on the docket of the Supreme Court by appeal from the Chancery Court. At the succeeding term, on motion of the complainant, a *scire facias* was issued in the case, requiring the taxing district of Shelby county to show cause why the suit should not be revived against it. The taxing district demurred to the *scire facias*.

William M. Randolph, for plaintiff.

C. W. Heiskell, J. B. Heiskell and George Gantt, for defendant.

The opinion of the court was delivered by

COOPER, J.—The *scire facias* in this state is a statutory mode of reviving suits in this court, as well as the inferior courts, against the heir, representative, assign or “other successor” of a deceased party: Code, sect. 2853, *et seq.* It has not been denied that the *scire facias* would lie in this case, if the taxing district could be brought in for the purpose of being proceeded against as a proper defendant. The argument in support of the demurrer is rested upon the ground that the new corporation sustains no such relation to the old corporation, as to authorize any proceeding against it in any mode for a debt of the latter. It is also said, that if the corporations are the same, no revivor is necessary. But if this be conceded, the complainant would still have the right, by suggestion of record, or otherwise, to bring the facts before the court, so that the further proceedings might be in the right name. In this view, the *scire facias* may be treated as a notice, and, in the absence of any special objection to the form of the proceedings, as sufficient to raise the issue to be determined: *East Tennessee, &c., Railroad Co. v. Evans*, 6 Heisk. 607. The real question is whether the new corporation is the same as the old corporation, or so far its successor as to be liable for its debts.

It was the received doctrine at one time, that by the principles of the common law, upon the civil death of a corporation, its real estate reverted to the original grantor, or his heirs, the debts due to and from it were extinguished, and its personal property vested in the state. The law was so stated, *arguendo*, in some of our

cases: *White v. Campbell*, 5 Humph. 38; *Ingraham v. Terry*, 11 Id. 572; *Hopkins v. Whitesides*, 1 Head. 31. There is reason to doubt whether the decisions of the courts ever justified such a statement of the law: *Bacon v. Robertson*, 18 How. 480. And it is now well settled, both in England and in this country, that equity will, upon the dissolution of a corporation by the expiration of its charter or otherwise, impound its property, real and personal, and appropriate it, first, to the payment of its debts, and then for the benefit of the stockholders. The law now is, independent of statute, that upon the civil death of a corporation, its real estate does not revert to its original owners, the debts due to and from it are not extinguished, and its personal property does not vest in the state. This court, in accordance with all the modern rulings, has expressly so held: *State v. Bank of Tennessee*, 5 Baxt. 101.

Looking only to the fact that a corporation is created by its charter, it is logically correct to say that each corporation called into being by an independent charter is a distinct entity. From this premise it has been ingeniously and ably argued that two successive corporations cannot be connected together any more than two human beings, born successively, can be treated as one. But if the doctrine of metempsychosis be admitted, the identity of individuals would be possible by the transmigration of the essential part, and their succession in rights and liabilities is recognised by law. And the legislature and the courts have settled the continuity of corporations by the transfer of their material parts, whether by identity or succession is practically immaterial, although the old charter may be expressly repealed and an entirely new charter granted.

It has been loosely said that whether a legislative charter will operate to revive and continue an old, or to create a new and distinct corporation, depends upon the intention of the legislature. More accurately it has been said, we must look to the terms of the charter, and give them a construction consistent with the legislative intent and the intent of the corporators. Both forms of expression are an adaptation of the language of Judge STORY in the case of a private corporation, where the corporate name of the new creation and some of the corporators were the same as those of a then existing corporation, but the residue of the corporators and the corporate property were not the same: *Bellows v. Hallo-*

well Bank, 2 Mason 43. But in no case have the courts ever failed to declare the identity or succession or continuity of the two corporations, where the same corporators and the same corporate property have passed to the new corporation. The "terms of the charter" have, in such cases, never been construed otherwise.

In reference to municipal corporations, the rule from the earliest times has been that a change of name or function would not affect obligations: *Luttrell's Case*, 4 Rep. 87 b; *Haddock's Case*, Raym. 489. Entirely new charters, upon a total cessation of user for years under an old charter, have been held to have no greater effect: *Colchester v. Seaber*, 3 Burr. 1866. "Many corporations," says Lord MANSFIELD in this last case, "for want of legal magistrates, have lost their activity and obtained new charters; and yet it has never been disputed but that the new charters revive and give activity to the old corporation. Where the question has arisen upon any remarkable metamorphosis, it has always been determined that they remain the same as to debts and rights."

The statute books of this state are full of instances where new charters have been granted to municipal corporations upon an express or implied repeal of the old charter, with a change of name and organization, and the continuity of the corporations, "as to debts and rights," never doubted. A striking instance is found in the history of the municipal corporation now before us. In 1849, the people and territory of the "City of Memphis" and of the town of "South Memphis" were reincorporated under the name and style of the "Mayor and Aldermen" of the city of Memphis, by an act which expressly repealed all laws to the contrary, the previous charters of the separate corporations being thereby repealed, as was held by this court: *Daniel v. Mayor, &c., of Memphis*, 11 Humph. 582. The conclusion of Mr. Justice FIELD on this subject is warranted by all the authorities: "When a new form has been given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intends a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities,

as well as the rights of property of the corporation in its old form, should accompany the corporation in its reorganization: *Broughton v. Pensacola*, 98 U. S. 266. To the same effect in substance are *Milner v. Pensacola*, 2 Wood 638; *Trustees v. City of Erie*, 31 Pa. St. 515; *Shankland v. Phillips*, 3 Tenn. Ch. 556; *Olney v. Harvey*, 50 Ill. 453; *Girard v. Philadelphia*, 7 Wall. 1. Neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these things combined, will destroy the identity, continuity or succession of the corporation, if the people and territory reincorporated constituted an integral part of the corporation abolished. The reason is to be found in the peculiar nature of such corporations. A charter for municipal purposes is an investing of the people of a place with the local government thereof, constituting an *imperium in imperio*, and the corporators and the territory are the essential elements, all else being mere incidents or forms: *Cuddon v. Eastwick*, 1 Salk. 192; *Luehrman v. Taxing District*, 2 Lea 425; *People v. Morris*, 18 Wend. 325; *People v. Hurlburt*, 24 Mich. 44, 88; *New Orleans Railroad Co. v. City of New Orleans*, 26 La. Ann. 478. And precisely as a change in the form of government, or even the conquest of a state, will not affect its rights or liabilities, whatever may be the incidental modifications, so neither will a change of the lesser empire. The property held by such a corporation for public use cannot be subjected to the claims of creditors, and is only held by it as trustee. The only means at its disposal for the payment of debt consist, ordinarily, of the taxes which it is authorized to raise from the persons, property and business within its territorial limits. The persons and property, or, as said above, the corporators and the territory, are the essential constituents of the corporation, and rights and liabilities naturally adhere to them.

The courts have accordingly held that creditors may follow these constituents even when divided out among other distinct municipalities, the original debtor corporation being abolished. As long as the old corporation continues to exist, although shorn of its proportions, the creditor may, and, according to some authorities, must, look exclusively to it: *Howard v. Horner*, 11 Hum. 532; *Laramie County v. Albany County*, 92 U. S. 307. A qualification of the latter part of the rule may be assumed,

although the point seems never to have arisen in judgment, where the municipality has been so reduced in population and territory as to be unable to meet its liabilities. If, however, two new townships are created out of an old one, it has been held that a judgment-creditor of the latter may revive his judgment by *scire facias* against each of the new townships, subject to only one satisfaction: *Plunkett Creek Township v. Crawford*, 27 Pa. St. 107. So, where one town was abolished by statute, and its population and territory unequally divided between two others, a creditor of the old town was held entitled, by bill, to charge each of the new towns with its proportion of the debt: *Mount Pleasant v. Beckwith*, 100 U. S. 514. "The effect of the annulment," says Mr. Justice CLIFFORD in this case, "and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one that ceases to exist, and that they will become liable for all the legal debts contracted by her prior to the time when the annexation is carried into operation." This court has reached the same conclusion in the case of a school district divided between other districts: *Bank v. Baber*, 6 Lea —. See also, *District of Columbia v. Cluss*, 103 U. S. 705. In view of the plenary powers of the legislature over municipal or quasi-municipal corporations, and the necessity of its frequent exercise according to public exigency, the wisdom of these rulings is obvious.

It has been argued that the liabilities of a dissolved corporation only follow its territory and population into a new corporation in the absence of any legislation on the subject, and that the legislature may expressly provide otherwise. But there is no warrant for the argument, either in reason or authority. Some of the learned judges, in delivering the opinion of the court in particular cases, have taken care, as was right and proper in a question of so much importance, to limit the decision to the very case before them, and have said that the result reached would follow, "at any rate, in the absence of any declaration of legislative intent to the contrary." No intimation has been given that if there was such declaration the decision would be different. Mr. Justice FIELD expresses the opinion in the *Pensacola Case*, that the liabilities will accompany the corporation in its new form, "in the absence of express provision for their payment otherwise." So Mr. Justice CLIFFORD's expression is that "the legislature

may regulate the subject;" that is, as the context snows, may proportion the liabilities between the new corporations, as its wisdom may suggest. Neither of these eminent judges, nor has any judge, intimated, much less decided, that the legislature could interfere with the rights of creditors, or the legal results of the legislation. On the contrary, every judge has, in view of the provision of the Constitution of the United States, unhesitatingly said that the legislature could not impair the obligation of the creditor's contract. If it were otherwise, the legislature might simply repeal the charter of a municipal corporation, and at once reincorporate the same people and territory under a similar corporation, and cut off all creditors by adding that the new corporation should not be liable for the debts of the old corporation. Such legislation would be obnoxious to the Constitution of the United States (art 1, sect. 10) and the Constitution of the state (art. 1, sect. 20, and art. 11, sect. 8). Even the right acquired by a pending suit cannot be affected by such legislation: Code, sect. 49; *Fisher v. Dabbs*, 6 Yerg. 119. And the legislature cannot do indirectly what it is not at liberty to do directly.

In the act repealing the charter of the city of Memphis there is a provision transferring the public property of the city to the "custody and control of the state, to remain public property for the uses to which it had been previously applied." By the act reincorporating the same community and the same territory in the name of the taxing district, this property is again transferred to the custody and control of the governing board of the new corporation, to remain public property for the like uses. The city of Memphis seems to have owned no other property. Confining ourselves, for the present, to these provisions of the act, the substance of what was done was, that the people and territory of the repealed corporation were at once reincorporated into a municipal corporation, and given possession of all the property of the old corporation for the same public use. The new corporation is identical with the old corporation in all its essential elements. A change in the form of the government would be unimportant. Unless, therefore, there is something else in the charter to take the case out of the rule, rights and liabilities would remain as before.

The act incorporating the taxing district expressly prohibits the governing agencies from levying taxes for any purpose, reserving that power in the legislature. It further provides that the local

government shall not "pay or be liable to pay any debt created by said extinct corporation, nor shall any of the taxes collected under the act ever be used for the payment of any of said debts." The latter provision is itself a legislative recognition of the identity, continuity or succession of the two corporations, for otherwise it would have been useless. And the question comes to this, can the legislature, where the corporations are substantially the same, according to the terms of the charter as construed by the courts, change the legal effect of what has been done, by positive mandate that the new corporation shall not be liable for the debts of the old? If it can, it would logically follow that the legislature could prohibit a corporation from paying its own debt. It has no such power. Such a prohibition is simply void: *Wolff v. New Orleans*, 103 U. S. 358. And in this case, under the circumstances, the provision in question is amenable to the constitutional objection that it undertakes to impair the obligation of contracts. Whether the legislature can withhold the taxing power as against debts previously contracted, is a grave question not now before us. It may be that the creditor cannot collect his debt, but, to use the language of Judge CLIFFORD in the *Beckwith Case*, "he ought always to be able by some proper action to reduce his contract to judgment." The creditor should have this right in the present case, both for the purpose of reaching his share of the assets which may be realized by the receiver, and to have the benefit of future legislation. The courts can never presume the permanent repudiation by the state of an honest demand. This court has decided that the holder of a valid claim on the treasury of the state is entitled to compel the controller to issue him a warrant therefor, although it cannot be paid without an appropriation for the purpose by the legislature, and no such appropriation has been made.

We express no opinion on any point not now before us. All we undertake at present to decide is, that the taxing district of Shelby county is so far the successor of the late corporation of the city of Memphis, or the same corporation under a new name, that a suit, pending against the old corporation, may be revived against the new, and prosecuted to judgment.

The decision in the principal case is a departure from the old doctrine of the common law, recognised in Tennessee as recently as 1858, when Judge CARUTHERS, in the case cited from 1 Head, following *White v. Campbell*, 5 Humph.

38, declared unqualifiedly that in case of dissolution of a corporation, "the debts due to and from the corporation are all extinguished, without some provision in the charter, or some general law to prevent it." And, of course, if the debt was extinguished, the suit should abate. In the case followed, the court declared that upon the civil death of a corporation by the expiration of its charter, its unsold real estate reverts back to the original grantor or his heirs, the debts due to and from the corporation are all extinguished and its personal estate vests in the state; quoting approvingly the language of Chancellor KENT to that effect in 3 Com., p. *307. And in the intermediate case of *Ingraham v. Terry*, 11 Humph. 571, Judge TURLEY said: "It is not to be deemed that, as a general principle, the dissolution of a corporation by the expiration of its charter *pendente lite* is an abatement of the suit, which cannot be renewed unless provision is made for such contingency in the charter;" and, by analogy, if the dissolution were by repeal, then the suit would abate, unless provision to the contrary were made in the act of repeal. No "general law to prevent it" has since been enacted in Tennessee; and it results that what was declared by Chancellor KENT to be "the old settled law of the land," and, as such, followed by the courts of Tennessee, has by this decision been overturned; and hereafter no "special statutory provision to the contrary" is necessary to prevent the abatement of a suit against a defunct corporation when a successor can be found.

The decision is doubtless in accord with the tendency and reasoning of the recent cases in the federal and many state courts, and in harmony with the spirit of the age, which, lacking the sacred veneration for the old common law, so much revered by our ancestors, which characterized judges formerly, is not satisfied with the statement of any

person as to what is "settled law," but in law, as in philosophy and religion, is ever demanding a re-investigation, a new revision and a satisfactory analysis according to the rules of modern science; and it also accords with the controlling sentiment of the country, which conforms to the just and imperious demands of commerce, that public obligations shall be as sacredly kept as private ones, and property, on the faith of which debt has been incurred, shall be subjected to its satisfaction, the "settled law of the land" to the contrary notwithstanding. More than that, it is safely grounded upon the articles of both the federal and state constitutions, which forbid legislation impairing the obligation of contracts.

The old holdings on this question in other states seem to have been generally in accord with the doctrine declared by Chancellor KENT to be settled law. In the earlier editions of Angell & Ames on Corporations, the law is stated without question or qualification, as declared by him; and it is added (sect. 779): "Upon the dissolution of a corporation in any mode, it follows therefore that all suits for or against it abate." So, too, in England. In the last century Blackstone says (vol. i., p. *484): "The debts of a corporation, either to or from it, are totally extinguished by its dissolution."

Notwithstanding the weight of authority of such distinguished names as these, a careful examination will disclose that Judge COOPER is warranted in expressing the doubt "whether the decisions of the courts ever justified such a statement of the law;" and will also discover that with the text-writers and judges there is much of doubt and indecision in regard to the effect of dissolution upon the debts of a corporation. The apparent confusion of the law upon the subject has resulted probably from two causes—first, the failure to keep prominent the distinction between the various kinds

of corporations, eleemosynary, municipal and private, and their difference in history, purposes, functions and powers; and, second, an omission to observe the marked difference between the powers of Parliament and of Congress, and the probable bearing of our constitutional guaranty of the obligation of contracts upon all questions arising under legislative dissolution, which Judge DILLON is of opinion is the only American method. *Vide supra.*

If the decisions of the courts did not warrant such a statement of the law as Blackstone and Kent both make, it is then interesting to know from what source they derive their authority for such declarations. The latter doubtless relied upon the former for his statement; and he, in turn, had probably relied upon Lord COKE. Blackstone precedes his statement of the effect of dissolution upon the debts of a corporation with a declaration of its effect upon its lands: "The body politic may also be dissolved in several ways, which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation." The earliest annotator cites Co. Litt. 13, to support this declaration, where Lord COKE says: "And so if land be given in fee simple to a deane and chapter, or to a mayor and commonalty, and to their successors, and after such body politique or incorporate is dissolved, the donor shall have again the land, and not the lord by escheate."

Burnet says (Hist. of Ref., vol. i., p. 261), it was much doubted, upon the dissolution of the abbeys, "whether the lands that formerly belonged to the religious corporation ought to have returned to the founders and donors by way of *reverter*, or to have fallen to the lords of whom the lands were holden, by way of escheat, or to have come to the Crown." And the editors of Co. Litt. cite several cases as contrary to

Lord COKE's statement of the law upon this subject. The solution of the question was perhaps rendered more difficult by the variety of the acts dissolving the orders of knights and disposing of their property, passed by Parliament during the reign of Edward II. and succeeding reigns, referred to in the marginal notes of Co. Litt., 13, b, and also of the sweeping acts of confiscation in the reign of Henry VIII., adopted by a subservient and jealous Parliament to destroy the abbeys, and thus give legal sanction to their lawless despoliation and the avaricious appropriation of their property to gratify the tyrannous rapacity of "the king with a pope in his belly," some of them perhaps providing for *reverter*, others prescribing escheat, and yet others declaring forfeiture."

Whatever may have been the state of the law with regard to religious and eleemosynary corporations, it is notable that no statute or decision is cited to support Lord COKE's application of the doctrine of reversion to municipalities; and it may well be doubted whether such ever existed. It is more probable that it took its origin in this declaration of his that the law was the same in the case of an "abbot and his successors," "a deane and chapter" and "a mayor and commonalty;" and that he was constrained thereto by the excessive fondness for analogy and generalization which characterized the old common-law judges and lawyers, and especially this greatest of them, and by the demands of the feudal proprietors and system for a rule of law that should govern realty in every imaginable case.

The disposition of the realty of a defunct municipality, however, is more interesting to the curious than important to the settlement of this question, as, whatever became of it, creditors were so little respected in those days that there was no probability of their receiving aught from it. What was to become of their personal estate, and of

their debts and credits, was of more interest to them, and has bearing upon this question. In the argument of the celebrated case of *quo warranto* against the city of London to forfeit its charter in the reign of Charles II., the learned Pollexfen asserted that this question was not settled by any adjudicated case, and was "*non definitur in jure*." Nor was it defined in that case; for the courts were relieved by act of parliament, annulling the sentence of forfeiture, from the embarrassment which its execution would have involved. The very able and exhaustive opinion of Mr. Justice CAMPBELL in *Bacon v. Robertson*, 18 How. 480, also warrants Judge COOPER in questioning whether the cases had settled the law as declared by Blackstone. The case of *Colchester v. Seaber*, 3 Burr. 1866, cited in the opinion on another point, does not aid in this branch of the investigation. Therein, as stated by Justice WILMOT, the question was "whether this corporation was dissolved by the judgment of *ouster* against individuals," which he quaintly answered with a "God forbid!" In this case the dissolution is undoubted. The legislature had the power to dissolve, and exercised it by the act of repeal. The question in this case is, Does the dissolution work an abatement of the suit?

An examination of the recent text-books, as well as the recent American cases, disperses the cloud of doubt in which the older cases and books leave it, and it seems now as clear that the law requires a negative answer, as a half century ago, that it required an affirmative one. In the later editions of Angell & Ames, in a supplemental section (779, a), it is stated that "the rule of common law in relation to the effect of dissolution upon the property and debts of a corporation has in fact become obsolete and odious. Practically, it has never been applied, in England, to insolvent or dissolved moneyed corporations. * * * Indeed, it may well be doubted whether,

in the view at least of a court of equity, it has any application to other than public or eleemosynary corporations with which it had its origin;" and the author concludes that without any statutory authority a court of equity will lay hold of the capital, property and debts of a defunct moneyed corporation, as a trust-fund, and, by virtue of its inherent power to administer trusts, will apply it first to the satisfaction of the claims of creditors. To the same effect also is Potter on Corp., sects. 699, 713, where the same doctrine is seemingly extended to municipal corporations as well as moneyed or trading. And Judge DILLON (Munic. Corp., sect. 113), says that to avoid the disastrous results of the old doctrine the English courts have recently doubted whether corporations can be *totally* dissolved; and, regarding the rule in America, he says (sect. 114), "As respects the creditors of a municipal corporation, their rights are protected from the legislative invasion by the Constitution of the United States, and no repeal of the charter of a municipal corporation can so dissolve it as to impair the obligation of the contract, or, it may probably be safely added, preclude the creditor from recovering his debt."

The current of recent decisions fully warrants these positive statements of the text-writers in the case of private corporations. The opinion of the court in the leading case of *State v. Bank of Tennessee*, 5 Baxt. 101, expressly recognises the doctrine that these debts are not extinguished by dissolution, thus in effect overruling the earlier cases on this subject. And it may be doubted if, at this time, the courts of any state in the Union question the inherent power of a court of equity to administer the affairs of a defunct private corporation for the benefit of its creditors. No case is cited in the opinion as a precedent for such action in the case of municipal corporations, and probably none was known to exist.

The cases cited from the decisions of the federal Supreme Court leave doubt whether such would be the holding in that court in case of a defunct municipality; and in *Meriwether v. Garrett*, 102 U. S. 472, wherein was involved the rights of certain creditors of this very city of Memphis, the court expressly withhold determination of the question of the power of a court of equity over taxes levied in obedience to contract obligations or under judicial direction. But none of the cited cases question the right of a creditor to have a judgment or decree in equity for the amount of his debt, or the duty of a court of equity to aid him in its recovery and satisfaction so far as possible under existing laws.

In *Wolff v. New Orleans*, 103 U. S. 358, Mr. Justice FIELD, commenting on an act of the legislature of Louisiana restricting the taxing power of said city so as to prevent it from paying debts contracted on the faith that the power of taxation would be exercised for their payment, said: "The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the state, and to those of its agents acting under its authority, as well as to the contracts of individuals. * * * The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution. The obligation of a contract is the law which binds the parties to perform their agreement." The act was accordingly declared unconstitutional and inoperative, and a *mandamus* ordered to levy and collect a tax. Under the reasoning of this opinion, it is difficult to see how, if no contemporaneous act of re-incorporation of the same people and territory had been passed, and no provision made for the payment of debts, the conclusion could be escaped that the repealing act was void because of its conflict with the constitutional inhibition against impair-

ing the obligation of contracts. While the city existed the creditor could recover judgment, and by *mandamus* compel the levy and collection of taxes for its satisfaction. This was the remedy which guaranteed the obligation of the contract; if it were gone, and nothing substantially as efficient substituted, the obligation of the contract, i. e. the legal process and remedy, which alone compels the debtor to perform his agreement, is not only impaired, but entirely destroyed. No such extreme resort, however, seemed necessary in this case, as the identity, continuity or successorship of the two corporations was evident, and left the court an easy way out of the apparent dilemma of deciding an act of repeal of the municipality unconstitutional, or of permitting the impairment of a contract thereby; and this was by reviving against the successor in fact and in right and power, as the successor also in liability and duty. The conclusion of Mr. Justice FIELD in the *Pensacola Case* cited, which, Judge COOPER says, is "warranted by all the authorities," is predicated upon premises which are as sound in logic as safe in law; and the reasoning of both judge and justice would seem to justify the conclusion that in this case, as in *Rex v. Fasmore*, 3 Term Rep. 199, the new charter was a renovation of the old corporation, "with all the debts and rights attached;" but the decision of the question did not demand so much, and, as Judge COOPER remarks, there may be a grave question of its correctness. Apparently, however, there is little room to doubt the correctness of the conclusion that the taxing district is "the successor" of the city within the meaning of the statutes of revivor in Tennessee, and, as such, liable to have the suit revived against it and judgment entered on the debt.

The case of *Mumma v. The Potomac Company*, 8 Peters 281, wherein a revivor was refused, has some points of resemblance to this one, but the points

of difference are so marked that it cannot be cited as a precedent. Therein it was decided only that a judgment at

law against a corporation could not be revived against it after its dissolution.

H. H. INGERSOLL.

Knoxville, Tenn.

Supreme Court of Indiana.

THE STATE OF INDIANA v. CALVIN SMITH.

In an indictment for an assault and battery, it is necessary to allege that the touching, striking or beating was done unlawfully.

A court cannot infer that a rude, insolent or angry touching was also unlawful.

It is not, however, necessary that the word "unlawful" should be used; but it will be sufficient if another term of the same import and meaning is employed.

ON appeal from the Tipton Circuit.

The indictment charged that the appellee, at a time and place therein named, "did unlawfully commit an assault and battery upon the person of one Michael E. Stokes, by then and there, in a rude, insolent and angry manner, touching, striking, beating, bruising and wounding him, the said Michael E. Stokes." The appellee moved to quash the indictment, because it was not averred that the touching was unlawful. The court below sustained the motion, whereupon the state appealed.

The following is the statute under which the indictment was framed: "Every person who, in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery, and upon conviction, shall be fined not exceeding one thousand dollars, to which may be added imprisonment not exceeding three months."

The opinion of the court was delivered by

ELLIOTT, J.—It is undoubtedly true, as the appellee contends, that an indictment for the offence of assault and battery must show that the touching was unlawful: *State v. Murphy*, 21 Ind. 441; *Cranor v. State*, 39 Id. 64. An indictment which does not show this leaves out an important and essential ingredient of the offence: *Howard v. State*, 67 Ind. 401. It has been repeatedly decided that the court cannot infer that a touching charged to have been unlawful was rude, insolent or angry, but that the manner of the touching must be expressly stated: *Slusser v. State*, 71 Ind. 280; *State v. Wright*, 52 Id. 307; and there is certainly

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stronger reason for holding that courts cannot infer that a rude, insolent or angry touching was also unlawful. The presumption is in favor of innocence and of the legality of facts, and the state must always show some fact or facts countervailing this presumption. It is always necessary, therefore, to show that the touching was unlawful; it is not, however, necessary that the word "unlawful" should be used. It will be sufficient if another term of the same import and meaning is employed: *State v. Trulock*, 46 Ind. 289; *Sloan v. State*, 42 Id. 570; *Adell v. State*, 34 Id. 546; *Cander v. State*, 17 Id. 307; *Carneille v. State*, 16 Id. 232.

The state contends that, conceding it to be necessary to show that the touching was unlawful, the indictment is still sufficient, because that fact is properly stated.

The argument is that the word unlawfully as used in the clause, "did then and there unlawfully commit an assault and battery upon the person of one Michael E. Stokes," applies to and qualifies the allegations, "by then and there touching, striking and beating the said Stokes." The appellee, upon the other hand, argues that the word unlawfully as used does not apply to the specific acts of touching and striking described, but that in order to have any such force, it should have preceded the word touching. It is, of course, immaterial in just what place a word or allegation of the charging part of an indictment is found, provided it forms part of the description of the offence charged.

An offence is properly charged by a statement of the material facts which constitute it, and not by the statement of mere conclusions of law. The phrase "did then and there unlawfully commit an assault and battery" is a mere conclusion of the pleader and not the averment of a material traversable fact. The word unlawfully, as therein used, is confined in its application and meaning to the general conclusion of the pleader that the accused did commit an assault and battery. The touching, striking and beating are not averred to have been unlawful. It is charged that the touching was rude, insolent and angry, but it is not charged that it was unlawful. The specific facts relied upon by the pleader are, that there was a touching and that it was angry and insolent, but there is no fact stated nor allegation made in that part of the indictment which describes the offence from which it can be concluded as a matter of law that the touching was not lawful. The pleader does, indeed, state generally his conclusion that the

accused did unlawfully commit an assault and battery, but in stating the facts which he alleges constituted the offence, he wholly omits to charge the essential fact of unlawfulness. If the touching was lawful, no offence was committed, and there is nothing in the facts stated from which it can be inferred that the touching was not entirely justifiable and lawful. The facts as stated do not support the pleader's conclusion that an assault and battery was unlawfully committed and without substantive facts for its foundation, the conclusion must go for naught. It was necessary to show that the touching was unlawful, and as the indictment fails to do this, the motion to quash was properly sustained.

Judgment affirmed.

A recent writer upon criminal pleading, referring to the use of the word "unlawfully," says: "The word 'unlawfully' is not often of much value in an indictment; it only asserts a conclusion of law, which, if it arises out of the facts set forth, is unnecessary; and, if it does not, is insufficient. But if a statute, in describing an offence which it creates, uses that word, an indictment framed on the statute is bad if that word be omitted, and it is generally best to insert it, especially as it precludes all legal excuse for the crime." Heard on Criminal Pleading 159.

A clear distinction is here drawn between the use of the word in a common-law indictment and one founded upon a statute. This distinction is drawn by the judges in the early English reports, and noticed by all writers upon criminal law. The absolute necessity of the use of the word, or its equivalent, in describing statutory crimes, seems to have been held necessary because the statute introduced a new crime, made that criminal which before was not, and the court would not hold an act criminal unless it was so specifically alleged. Since, in many states, all crimes are statutory, it would seem that the rule is followed while the reason for its use, as distinguishing between general and exceptional crimes, had ceased. How-

ever this may be, it will be seen that the rule is correctly laid down in the case reported, and is universally followed by the courts.

Hawkins says he can find no express authority for the use of the word "unlawfully" at common law: vol. ii., ch. 25, sect. 96; and he cites 1 Keble 559, and 2 Keble 715. The point is not expressly adjudicated in these cases. There counsel raised this (among several other) objections to the indictment, but all their objections were overruled without referring to any of them specially. And Hawkins says it was expressly held that its use was not necessary in an indictment for a riot, because the act itself contained in the indictment so plainly appears to be unlawful; citing 2 R. Abr. 82; Cro. C. C. 43. At an early day, in Indiana, the Supreme Court, speaking of a common-law indictment, said: "An indictment must set forth an unlawful killing or it will be defective. If it does describe the manner of killing, so as to show clearly that it was unlawful, the insertion of the word 'unlawful' is unnecessary; and, if it does not so describe the killing, the word 'unlawful' would not aid the description: *Jerry v. The State*, 1 Blackf. 395. This case is approved in *Weinzorpflin v. State*, 7 Blackf. 195, although a different rule is said to prevail in indictments founded

on a criminal statute. So in *State v. Bray*, 1 Mo. 180, the word "unlawfully" was held not necessary: *State v. Williams*, 3 Foster (N. H.) 321. And where a statute merely divides a common-law crime into degrees and apporions the punishment, the indictment does not follow the general rule concerning statutory offences; charging the crime as a common-law offence is sufficient: *Davis v. State*, 39 Ind 355.

Where an indictment is framed upon a statute an entirely different rule prevails as to the use of the word "unlawfully." "But where a statute uses the word 'unlawfully' in the description of an offence, it is certain that an indictment grounded upon it must use the word *illicite*, or some other tantamount:" 2 Hawk. Ch. 25, sect. 96; *Commonwealth v. Twitchell*, 4 Cush. 74; *Curtis v. The People*, Breese (Ill.), 2d ed. 256; *Barber v. The State*, 13 Fla. 675. No authority is cited to maintain this proposition, but it is assumed as an unquestionable fact. Chitty cites Bac. Abr., "Indictment," G, 1, and Cro. C. C. 43. This position is not overthrown by the case of *Beatson v. Rushforth*, 2 Marsh. (Eng.) 362, which was a case founded upon a penal statute; nor by Doug. 699, *Ratliffe v. Eden*, Cowp. 485, or by *The King v. Judd*, 2 T. R. 255; see *King v. Burnett*, 4 M. & S. 272; *Weinzorpflin v. The State*, 7 Blackf. 195. Where the words of a statute were, "if any father shall have sexual intercourse with his daughter, knowing her to be such," and the indictment alleged that the defendant A *unlawfully* did have sexual intercourse with his daughter B, the said B then and there knowing that she, the said B, was his, the said A's daughter," it was held that this was insufficient, as not containing the averment of the knowledge of relationship. The word "unlawfully" was not equivalent to the words of the statute, did not constitute such averment, and added nothing to the indictment: *Williams v.*

State, 2 Ind. 439. But it was held that in an indictment based upon a statute, "if any person shall make an assault with intent to commit murder," &c., the word "unlawfully" was unnecessary: *State v. Williams*, 3 Foster (N. H.) 321: so in *Capps v. State*, 4 Iowa 502. And it was said, in *United States v. Driscoll*, 1 Low. 305, that "the word 'unlawfully' is not often of much value in an indictment." This was spoken with reference to an indictment framed upon a statute. In other cases its use has been held necessary: *Commonwealth v. Sholes*, 13 Allen 554. And alleging that the act was done unlawfully does not dispense with a statement of the facts constituting the offence: *Commonwealth v. Byrnes*, 126 Mass. 248. But if the statute does not define the crime, but speaks of it by name only, a common-law indictment is sufficient; the word "unlawful" is not essential: *Perry v. The People*, 14 Ill. 499; see *Weinzorpflin v. The State*, 7 Blackf. 195. In a case decided in 1863, the indictment charged that the defendant "did then and there wear, and carry concealed about his person, a dangerous and deadly weapon." The statute was that any one who shall be convicted of wearing, or carrying concealed, any dangerous or deadly weapon shall be fined, &c. The word "unlawful" was not used in the statute; and it was held that the indictment was sufficient: *The State v. Swope*, 20 Ind. 106. So, where the indictment charged that A "did then and there strike, beat and wound, in a rude and insolent manner, with intent then and there, the said B, purposely, feloniously, and with premeditated malice, to kill and murder," framed upon the statute quoted above, it was a sufficient charge of assault and battery: *State v. Murphy*, 21 Ind. 441.

And the word "unlawful" may be used instead of another technical term. Thus, it was held synonymous with the word "illegal:" *State v. Hayworth*, 3

Sneed 64. But where the indictment alleged that the act was done "feloniously, voluntarily and maliciously," founded upon a statute that declared the act must be done "unlawfully and maliciously," the words used were not an equivalent, and the indictment was held bad: *Rex v. Turner*, R. & M. C. C. R. 239; 4 C. & P. 245; 1 Lewin 9. So, the word "feloniously" was held not the equivalent of "unlawfully and maliciously:" 2 Russ. Cr. 1066; *Rex v. Turner*, 1 Moody C. C. 239; *Rex v. Ryan*, 2 Id. 15. Where an indictment charged that the defendant "wilfully obstructed the public road, &c., contrary to the law," it is a sufficient averment that the act was done unlawfully; *Capps v. State*, 4 Iowa 502. The words "wrongfully and injuriously" are the equivalent of "unlawfully" in an indictment for maintaining a nuisance in a highway: *State v. Vermont Central Railroad Co.*, 1 Williams (Vt.) 103. "With intent to commit a felony" is substantially the same as "feloniously:" *Dillard v. State*, 3 Heisk. 260. Averring that the act was done "maliciously and without any lawful justification" is

the equivalent of the averment that it was done "unlawfully:" *Commonwealth v. Thompson*, 108 Mass. 463.

Where a statute makes the doing of an act "wilfully and maliciously" criminal, it will not be sufficient in the indictment to charge that it was done "feloniously, unlawfully and wilfully:" *State v. Gove*, 34 N. H. 511; nor is "unlawfully and maliciously" the equivalent of "wilfully and maliciously:" *State v. Hussey*, 60 Me. 410. So, "feloniously" is not only tantamount to "unlawfully," but is a word of far more extensive and criminal meaning: *Weinzorpfen v. The State*, 7 Blackf. 186; *Sloan v. State*, 42 Ind. 570; *Greer v. State*, 50 Id. 267; *Beavers v. State*, 58 Id. 530; *Shinn v. State*, 68 Id. 420. "Unlawfully and feloniously" are more than the equivalent of "falsely:" *State v. Dark*, 8 Blackf. 526. In *State v. Murphy*, 21 Ind. 441, it is said, "one man cannot strike another with the malicious and premeditated intent to murder him—murder being a technical term—without so doing unlawfully."

W. W. THORNTON.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ERRORS OF CONNECTICUT.²

SUPREME COURT OF ILLINOIS.³

COURTS OF APPEAL OF LOUISIANA.⁴

SUPREME COURT OF RHODE ISLAND.⁵

SUPREME COURT OF WISCONSIN.⁶

ACKNOWLEDGMENT.

Evidence to Impeach.—In the absence of evidence of fraud, con-

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

² From John Hooker, Esq., Reporter; to appear in 48 Connecticut Reports.

³ From Hon. N. L. Freeman, Reporter; to appear in 101 Illinois Reports.

⁴ From Hon. Frank McGloin, Reporter; to appear in vol. 1 of his reports.

⁵ From Arnold Green, Esq., Reporter; to appear in 13 Rhode Island Reports.

⁶ From Hon. O. M. Conover, Reporter; to appear in 53 or 54 Wis. Reports.

spiracy or overreaching of any kind, or anything casting a suspicion upon the integrity or honesty of the certifying officer, and when the certificate of acknowledgment of a deed is in conformity with the statute, it cannot be impeached by merely negating the facts therein stated: *Strauch v. Hathaway*, 101 Ill.

As between the former owner of land and an innocent purchaser under a deed of trust, before the title of the latter can be defeated by impeaching the truthfulness of the certificate of acknowledgment to the trust deed, the evidence must be clear and conclusive, excluding every reasonable doubt: *Id.*

AGENT.

Purchase by—Liability of Undisclosed Principal.—Where goods are sold to a person who is in fact an agent of another, and on his credit, but without knowledge of the agency on the part of the seller, the latter has the right to elect to make the principal his debtor on discovering him: *Merrill v. Kenyon*, 48 Conn.

And the same principle applies where the seller is informed at the time of the sale that the buyer is an agent, but is not informed who the principal is: *Id.*

And where the seller takes the promissory note of the buyer for the goods, with knowledge that he is an agent, but without knowledge who is the principal, he is not debarred thereby from electing to make the principal his debtor: *Id.*

ARBITRATION.

Provision for in Contract—Effect of—Waiver.—Where parties definitely agree in their contract to submit all differences which may arise thereunder to arbitration, this stipulation is binding, and either party appealing to the courts, before submitting to or tendering arbitration, will be dismissed: *Alford v. Tiblier*, 1 McGloin.

Such a defence, however, is waived where the party sued appears and presents his defences, without specially pleading this objection: *Id.*

BILLS AND NOTES.

Acceptance—Obligation of Acceptor.—A party accepting a commercial draft or bill of exchange guarantees the right of the drawer to execute it, and the genuineness of the signature. In innocent hands, this guarantee extends to the question of an agent's authority where the draft is drawn by procuration. It does not, however, operate to protect the person who originally receives the paper and is so chargeable with the obligation of making due inquiry: *Agnel v. Ellis*, 1 McGloin.

CONFLICT OF LAWS.

Adopted Child—Right of Inheritance.—The rights of inheritance acquired by an adopted child under the laws of another state, where he was adopted, will be recognised and upheld in this state only so far as they be not inconsistent with our laws of descent, so that if such child cannot take by descent by our statute, it cannot take at all, no matter what may be the law of the state where the adoption was made: *Keeagan v. Geraghty*, 101 Ill.

As against an adopted child, the statute should be strictly construed

as being in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature, which has prevailed from time immemorial: *Id.*

CONSTITUTIONAL LAW.

Intoxicating Liquors—Statutory Provision as to Proof of Sale.—Pub. Laws R. I., cap. 797, sect. 4, of March 18th 1880, provides: "It shall not be necessary to prove an actual sale of the liquors enumerated in sects. 18 and 19 of said chapter 508, in any building, shop, saloon, place or tenement, in order to establish the fact that any of said liquors are there kept for sale; but the notorious character of any such premises, or the notoriously bad or intemperate character of persons frequenting the same, or the keeping of the implements or appurtenances usually appertaining to grog-shops, tippling-shops, or places where such liquors are sold, shall be *prima facie* evidence that said liquors are kept on such premises for the purposes of sale within this state." *Held*, unconstitutional, in depriving the accused of the protection of the common-law principle that every person is to be presumed innocent until he is proved guilty, and in violating the provision that an accused shall not "be deprived of life, liberty or property, unless by the judgment of his peers or the law of the land:" *State v. Beswick*, 13 R. I.

CONTRACT.

Failure of Consideration.—A. sold certain goods to B., taking in payment the standing wood on a farm held by B. Of this standing wood, the amount brought to market by A. only paid the outlay made for cutting and hauling, and the trade with B. was made pending equity proceedings, which involved the title to the farm, and which resulted adversely to B. *Held*, that there was a total failure of consideration for the goods sold by A. to B. *Held, further*, that A. could maintain assumpsit against B. for the value of these goods: *Peckham v. Kiernan*, 13 R. I.

Purchase of Stock on Margin—Evidence of meaning of "Margin"—Wagering Contract—Usury.—The defendant wrote the plaintiffs, who were stockbrokers in the city of New York—"I want to buy say one hundred shares Union Pacific stock on margin. You will take \$1000 first mortgage N. York & Oswego R. R. and do it?" The plaintiffs replied that they would, and at once bought the stock, and soon after sold it by the defendant's order at a profit. Other stocks were afterwards bought and sold by the plaintiffs for the defendant under the same arrangement, resulting in a final loss, exceeding the value of the security held, and the plaintiffs sued for the balance. *Held*, 1. That evidence was admissible on the part of the plaintiffs to show the meaning of the words "on margin," that term being used by stockbrokers and having acquired a special and well understood meaning in their business 2. That the contract not being one for the mere payment of differences, but the defendant having, through the plaintiffs as his agents, actually purchased the stock, which was delivered to them, and which they were ready to transfer to him on payment of the purchase-money, it was not a gaming contract: *Hatch v. Douglas*, 48 Conn.

The custom of stockbrokers to debit and credit interest monthly,

computing interest on balances, does not necessarily involve usury, as the balances may be paid. But if the taking of such interest would be usury, it is only a question of the allowance of it by the court, and does not affect the contract for the purchase and sale of the stocks, as it is wholly outside of it: *Id.*

Stipulation for Particular Measurement.—A clause in a contract of sale, that the measurement shall be by a person named, is obligatory, in default of fraud or error alleged, such as would justify rescission: *Danner v. Otis*, 1 McGloin.

A simple averment in the answer to a suit upon such a written contract that the measurement is not correct, according to a particular rule or method not specified in the agreement, will not warrant the introduction of evidence to contradict, annul or amplify the contract: *Id.*

CORPORATION.

Transfers of Stock—Failure to Record—Attachment.—B., owning certain corporate shares, transferred them on the books of the corporation as collateral security to G. The arrangements between B. and G. being ended, G., at B.'s request, endorsed and transferred the certificate of the stock to D., a creditor of B. Before any transfer had been made on the books of the corporation from G. to D. the stock was attached as the property of B. by B.'s creditors. The charter of the corporation contained no provision as to the transfer of stock, but the by-laws provided that "all transfers of stock shall be made in the books of the company." On a bill in equity brought to establish the lien of the attachment, *held*, that in the absence of a fraudulent intent on the part of B. in the transfer of the stock the attachment could not be sustained. *Held*, further, that at the time of the attachment B. had neither the legal title to the stock which was in G., nor the equitable title which was in D.: *Beckwith v. Burroughs*, 13 R. I.

COVENANT.

What amounts to.—Neither express words of covenant nor any particular words, nor any special form of words are necessary in order to charge a party with covenant. Sometimes words of proviso and condition, or even recitals, will be construed into words of covenant, such being the apparent intention and meaning of the parties: *Hale v. Finch*, S. C. U. S., Oct. Term 1881.

Covenant will not arise unless it can be collected from the whole instrument that there was an agreement or promise or engagement upon the part of the person sought to be charged for the performance or non-performance of some act: *Id.*

CRIMINAL LAW.

New Trial—For Newly-Discovered Evidence.—A new trial will not be granted on the ground of newly-discovered evidence, where it does not appear but the evidence might have been had on the trial by the exercise of reasonable diligence, nor where such evidence is in its nature impeaching only: *Tobin v. People*, 101 Ill.

New Trial—After-Discovered Evidence.—The rules with regard to

petitions for new trials for newly-discovered evidence in civil cases, apply to such petitions in criminal cases: *Hamlin v. The State*, 48 Conn.

And they apply equally to capital cases; although as an error here would be remediless, the court will be more inclined to give the petitioner the benefit of any doubt that may be raised in their minds by the new evidence: *Id.*

It is one of these rules that the evidence must be sufficient to change the result if a new trial should be had: *Id.*

DAMAGES.

Negligence—Value of use of Animal Injured.—In an action for an injury to plaintiff's mare, from which she died, and which is alleged to have been caused by a defective highway, it was error to admit evidence of the value of the use of the animal during the period which intervened between the injury and the death, "including plaintiff's services in taking care of her:" *Page v. Town of Sumpter*, 53 or 54 Wis.

Where the verdict in such a case necessarily includes the value of the animal at the time of the injury, and also a considerable sum for the loss of her use after the injury, the damages will be regarded as excessive: *Id.*

DEBTOR AND CREDITOR. See *Husband and Wife*.

Contract for Construction of Chattel—Payment—Agreement that Title shall vest in Buyer.—Where one contracts with another for a chattel not in existence, but to be made for him, though he pays the whole price in advance or from time to time as the work progresses, he acquires no title in the chattel until it is finished and delivered to him, unless a contrary intent is expressed: *Shaw v. Smith*, 48 Conn.

And where the parties agree that the title shall at once vest in the buyer, so that the sale is complete as between the parties, yet the retention of possession by the maker leaves the chattel open to attachment by the creditors of the latter: *Id.*

Sale of Property not yet in Existence—Change of Possession.—By a contract between A. and B., all the colts thereafter foaled by certain mares sold by B. to A., and kept in B.'s stables under A.'s care were to belong to A. *Held*, 1. That a valid sale could be made of the colts before they were foaled. 2. That the question of retention of possession by B. could not apply to them, as they were not in existence when the mares were sold to A. and the contract made. 3. That it was not important, upon a question between A. and the creditors of B. as to the title to the colts, whether there had been a legal and visible change of possession as to the mares: *Hull v. Hull*, 48 Conn.

DECEDENT'S ESTATE. See *Will*.

EMINENT DOMAIN.

Highways—Streets—Use for Railroad Purposes—Extent of use Granted.—A grant of power to a railroad company to construct its road upon or across a road or highway which the route of its road may intersect, the corporation to restore the road or highway to its former state, or in a sufficient manner not to impair its usefulness, is equivalent to allowing a joint use of the highway by the company with the public,

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protecting its uses as an ordinary highway against any impairment. It does not authorize a use to the exclusion of ordinary travel thereon : *P., Ft. W. & C. Railroad Co. v. Reich*, 101 Ill.

EQUITY. See WILL.

Remedy to compel Issue of Corporate Bonds.—A court of chancery has no jurisdiction to entertain a bill to compel the corporate authorities of a town to issue and deliver its bonds in pursuance of a vote to aid in the construction of a railroad. The proper remedy is by mandamus. Such court has not the power to compel the performance of contracts for the payment of money or to give notes or bonds : *The Chicago, D. & V. Railroad Co. v. Town of St. Anne*, 101 Ill.

Action to Remove Cloud upon Title—By whom Maintainable—Parties.—Where the facts which render an assessment upon land invalid, are not matter of record, an action to prevent a cloud upon the title, by setting aside the assessment, may be maintained either by the present owner of the land in possession, or by one who has conveyed it by warranty deed with full covenants : *Pier v. Fond du Lac Co.*, 53 or 54 Wis.

In such an action by the grantor, the grantee, though a proper is not a necessary party, especially where parcels of the land have been granted to many persons severally : *Id.*

EVIDENCE.

Officer's Return.—An officer's return is evidence of the facts stated in it only so far as the return is responsive to the writ : *Parker v. Palmer*, 13 R. I.

Hence, when to a writ of replevin an officer made return that he found the goods in the town of H. *Held*, that the return was not evidence that the goods were found in the town of H. : *Id.*

Parol Evidence to add to Written Contract.—Where a contract is reduced to writing, which purports to contain the whole contract, and it is not apparent from the writing itself that anything is left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible : *Heil v. Heller*, 53 or 54 Wis.

FORMER ADJUDICATION.

Judgment—Not binding on Strangers to the Action.—One not a party to an action, nor notified of its pendency, having no opportunity or right to control the defence, to introduce or cross-examine witnesses, or to prosecute a writ of error from the judgment therein, is not bound by such judgment : *Hale v. Finch*, S. C. U. S., Oct. Term 1881.

FRAUDS, STATUTE OF.

Guaranty of Note given for Guarantor's Debt.—Where a debtor induces his creditor to take in settlement of the indebtedness the note of a third person, with such debtor's guaranty of its payment, not stating the consideration, this is in effect a promise by such debtor to pay his own debt in a particular manner, and is not within the Statute of Frauds : *Eagle M. & R. Machine Co. v. Shattuck*, 53 or 54 Wis.

GUARDIAN AND WARD.

Lease of Wards' Land without approval by Probate Court—Validity of.—A lease of property by a widow in her own right, and as guardian for her minor children, cannot be avoided by the lessee for want of its approval by the Probate Court. A lease executed by a guardian in behalf of his wards for a term not exceeding their majority is valid, unless disapproved by the Probate Court. The approval of that court is not essential to the validity of the lease: *Field v. Merrick*, 101 Ill.

HUSBAND AND WIFE.

Divorce—Opening of Decree.—A decree of divorce is subject to the order of the court during the term at which it is entered, and may on proper application and for good reasons be reopened and reheard during such term: *Mumford v. Mumford*, 13 R. I.

Such a decree will not be reopened at the request of a respondent whose conduct during the proceedings has shown a wish to cause delay, and who has been guilty of false pleading: *Id.*

Conveyance by Husband to Wife—Bona fides—Burden of Proof.—In an action between a wife and her husband's creditors, where she claims property in dispute by purchase from her husband, the burden is upon her to prove, by clear and satisfactory evidence, that such purchase was made in good faith, for a valuable consideration paid out of her separate estate, or by a third person for her; and the same rule applies to one who took from the wife with notice: *Horton v. Dewey*, 53 or 54 Wis.

In such a case, a mere recital of a valuable consideration, in the bill of sale from husband to wife, will not support a verdict in her favor: *Id.*

INSURANCE.

Mutual Company—Assessment—Pleading.—A certificate of membership in a mutual life insurance company provided that, on the death of the wife of the plaintiff, an assessment should be made upon the policy-holders in the company for as many dollars as there were policy-holders, and that the sum collected, not exceeding one thousand dollars, should be paid to him within ninety days from the filing of the proof of death. *Held*, that a declaration containing no allegation of a neglect to make the assessment provided for, and assigning no breach except of a promise to pay one thousand dollars was fatally defective, and that the defect was not cured by the verdict: *Curtis v. The Mutual Benefit Life Co.*, 48 Conn.

JUDGMENT. See *Former Adjudication.*

LANDLORD AND TENANT.

Prior Tenant holding Over—Rights of Subsequent Lessee.—A lessee cannot have his lease set aside and be released from his covenants to pay rent from the mere fact that a prior tenant, whose term has expired, holds over without right. The lessee, having the right of possession, should take legal steps to obtain possession against such prior tenant: *Field v. Herrick*, 101 Ill.

LIMITATIONS, STATUTE OF.

What Promise will take Case out of—A debtor, whose debt was barred by the Statute of Limitations, said to his creditor with regard to it, "I will pay it as soon as possible." *Held*, to be a sufficient acknowledgment of the debt to take it out of the statute: *Norton v. Shepard*, 48 Conn.

As a general rule any language of the debtor to the creditor clearly admitting the debt, and showing an intention to pay it, will be considered an implied promise to pay and will take the case out of the statute: *Id.*

MASTER AND SERVANT.

Contract to give Notice—Forfeiture—Temporary Absence.—An operative in the mill of the Flax Manufacturing Co. had agreed in writing to give "two weeks' notice of his desire to quit the service of said company at any time, or in default of said two weeks' notice to forfeit two weeks pay." *Held*, that the agreement did not apply to a temporary absence; that in case of a temporary absence without leave the operative might properly be discharged, but that there would be no forfeiture under the agreement of wages then earned: *Heber v. The Flax Man. Co.*, 13 R. I.

MINES.

Re-location—Annual Work—Entry—Acts of Congress.—Where the original locators of a mining claim who have neglected to perform the annual work required by the Act of May 10th 1872, 17 stat. 91, ch. 152, resume such work before a relocation by other parties, such resumption will continue their claim until the end of the year in which the work was resumed. The Act of June 6th 1874, 18 stat. 61, ch. 220, makes no change in this respect: *Belk v. Meagher*, S. C. U. S., Oct. Term 1881.

A re-location by other parties during the year in which work is resumed gives the new parties no right to the possession even though they remain in possession after the expiration of such year: *Id.*

In such case the original owners by a peaceable entry on their claim may secure a good right which will enable them to hold the claim as against such other parties: *Id.*

MORTGAGE.

Description of Debt—Parol Proof.—If in a mortgage the total amount of indebtedness secured is stated it is not necessary to specify the items of such indebtedness. If there has been no fraud, and subsequent creditors have not been injured by the omission of such specification, the identity of the debt may be established by parol. In making the proof, the debt must come fairly within the general description which has been given, but if it does, and the identity is satisfactorily made out, the mortgage will be sustained: *Wood v. Weimer*, S. C. U. S., Oct. Term 1881.

MUNICIPAL BONDS. See *Equity*.

NATIONAL BANK.

Usury—Purchase of Business Paper.—The fact that by the law of

the state in which a national bank is situated, the purchase of business paper from the payee, at a greater rate of discount than the legal interest, is not usurious, will not relieve the bank, in case it discounts such paper for the payee at a rate in excess of the legal interest, from the penalty imposed by sect. 5198, Rev. Stat.: *Nat. Bank of Gloversville v. Johnson*, S. C. U. S., Oct. Term 1881.

NEGLIGENCE. See *Railroad*.

OFFICER. See *Records*.

PARENT AND CHILD. See *Conflict of Laws*.

Meaning of word "Child"—Grandchildren.—The by-laws of a benevolent association provided that on the death of a member a sum of money should be paid "to the widow of such member, if there be one; if he leaves no widow, then to the child or children, or their lawful guardian for them, share and share alike. Should the deceased member leave no widow, child or children, the money shall be paid to such person as he may have designated in writing." *Held*, that the words "child or children" must be taken in their primary meaning, and could not be extended to include grandchildren: *Winsor v. Odd Fellows' Beneficial Association*, 13 R. I.

PATENT.

Public Use—What Constitutes.—To constitute a public use of an invention it is not necessary that more than one of the invented articles should be used, or that such use should be by more than one person. And if the inventor permits such use without restriction, it is a public use, notwithstanding that by the very character of the invention it is only capable of being used where it cannot be seen by the public eye: *Egbert v. Lippman*, S. C. U. S., Oct. Term 1881.

PAYMENT.

Made under Mistake of Fact recoverable back.—Where a person buying milk pays for the same, counting each can as containing eight gallons, supposing the cans to hold that much, when in fact they do not, he may set off the money paid by him for the shortage out of any sum he may owe the seller, in a suit for its price: *Devine v. Edwards*, 101 Ill.

RAILROAD.

Negligence—Persons walking on Track.—A railroad company is bound to provide for a careful lookout in the direction in which a train is moving, in places where people, and especially where children, are likely to be upon the track: *Townley v. C., M. & St. P. Railroad*, 53 or 54 Wis.

Although the statute (sect. 1811, R. S.) makes it unlawful for a person not connected with or employed upon a railroad, to walk along the track thereof, "except when the same shall be laid along public roads or streets," yet where the question is whether a person injured while walking upon a railroad track was guilty of a want of ordinary care, it is error to reject evidence showing that many persons, men, women and children, had, for years before the accident in question, been in the

habit of passing, daily and hourly, up and down in the same pathway on which the injured person was passing—since such evidence would tend to show a license, or to repel the inference of a want of ordinary care, and also to show a lack of such care on defendant's part as the facts required: *Id.*

Grant of Land—Location.—In all grants which are to be satisfied out of sections along the line of a road, it is necessarily implied, in the absence of specific designation otherwise, that the land is to be taken from the nearest undisposed sections of the character mentioned. Such grants give no license to the grantees to roam over the whole public domain lying on either side of the road in search of land desired. The grants must be satisfied out of the first land found which meets the conditions named: *Wood v. Burlington & Mo. River Railroad Co.*, S. C. U. S., Oct. Term 1881.

RECEIVER.

Foreign Corporation.—A foreign corporation is for purposes of jurisdiction a "resident" of the state which creates it, and under the laws of Rhode Island the courts of that state have no power to appoint a receiver of the estate of a foreign corporation doing business within the state: *Stafford v. American Mills Co.*, 13 R. I.

RECORDS.

Books of Public Officer—Dedication to Public use.—The books which the recorder of mortgages for the parish of Orleans has purchased and placed in his office to be used for making the inscriptions authorized and required by law, and which have been partially filled, have been, by such use, dedicated to the public service, and they are no longer susceptible of private ownership: *Herron v. McEnergy*, 1 McGloin.

The researches or memoranda of mortgages existing against certain persons, which have been made by the clerks of the recorders, and which are used in facilitating the preparation of certificates of mortgages, are archives of the mortgage office, and not the private property of the recorders: *Id.*

SALE. See Debtor and Creditor.

Conditional Sale—What is—Breach of Condition—Suit for Purchase-money.—The defendant received of the plaintiff an organ, and signed and delivered to him the following agreement prepared by the plaintiff: "The subscriber has, this 21st day of December 1877, rented of H. (the plaintiff) one choral organ, during the payment of rent as herein agreed, for the full rent of \$190, payable as follows: one melodeon valued at \$50, as first payment, and one note for \$140, due January 15th 1879; with the understanding that if I shall have punctually paid all said rent I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due, all my rights herein shall terminate, and said H. may take possession of said organ." *Held*, not to be a lease of the organ, but a conditional sale, and that the plaintiff could not recover upon the \$140 note after the organ had been returned: *Hine v. Roberts*, 48 Conn.

The consideration of the note was not the mere right to pay for and receive title to the organ, but the actual purchase and the acquisition of title as an accomplished fact. When, therefore, the purchase failed there was a complete failure of consideration : *Id.*

SHERIFF.

Seizure of Property—Liability of Sheriff.—Sheriffs, under writs directing, in general terms, the seizure of a debtor's property, must, at their peril, primarily determine whether the property to be seized belongs to the defendant or not : *Clavie v. Waggaman*, 1 McGloin.

Under writs commanding the seizure of specific property, the sheriffs, ordinarily, have no discretion and incur no responsibility, being held only to look to the jurisdiction of the court, and to the proper execution of its mandates : *Id.*

Cannot Arrest out of the County—Duties of.—The sheriff of one county cannot make an arrest in another county except on fresh pursuit in case of an escape, nor can he detain in such other county an arrested prisoner, except under a writ of *habeas corpus* : *Page v. Staples*, 13 R. I.

A sheriff is not obliged to travel about with an arrested prisoner to enable the latter to procure bail : *Id.*

STATUTE.

Repeal—Effect on Right of Action under.—Where, during the existence of a statute which made it unlawful for a railroad company to charge for the carriage of freight higher rates than those prescribed in the act, plaintiff was compelled by the defendant railway company to pay higher rates, and paid them under protest, the subsequent repeal of the statute will not prevent his recovering damages for defendant's unlawful act : *Graham v. C. M. & St. Paul Railroad Co.*, 53 or 54 Wis.

TAXATION.

Assessment—Constitutional Law.—The taxing power belongs to the legislative department, and it is entirely within the province of that department to determine the rules of assessment of property and for the collection of taxes : *State v. Board of Assessors*, 1 McGloin.

UNITED STATES COURTS.

Jurisdiction—Collusive Transfer to bring Suit in United States Court.—Where in a federal court the evidence shows that there had been a collusive transfer to a citizen of another state in order to give jurisdiction, it is the duty of the court on its own motion to stop the proceedings and dismiss the suit : *Williams v. Township of Nottawa*, S. C. U. S., Oct. Term 1881.

USURY. See *Contract* ; *National Bank*.

VENDOR AND VENDEE.

Right to Alley.—Where parties purchase from a common vendor, who has laid out in the rear an alley common to them all, but by their titles their lots run back only to such alley, they receive no right,

except that of use to the land taken up thereby: *Bourke v. Perry*, 1 McGloin.

Vendor's Lien—Advances of Money to Vendee by a Stranger.—A. purchased one hundred and twenty acres of land, for the benefit of B., and paid the purchase-money, and had the deeds made to B. The deed was left with A., and, upon B.'s paying back to A. part of the consideration money, and giving A. his notes for the remainder, the deed was delivered to B., and he went into possession of the land. *Held*, that, in the view of equity, A. and B. stood in the relation of vendor and purchaser of the land, and the former had a vendor's lien for the amount of the unpaid notes: *Carey v. Boyle*, 53 or 54 Wis.

Even if A. is to be regarded as a stranger to the title, who merely advanced money to B. for the sole purpose (as understood by both) of enabling the latter to purchase the land, he is entitled, by the law of this state, to be subrogated to the rights of the vendor: *Id.*

WATERS AND WATERCOURSES.

Riparian Proprietor—Ownership of Bed of Stream—Right to Ice.—A stream above the tide, although it may be navigable in fact, belongs to the riparian proprietor on each side of it to its centre thread, and the only right the public has therein is an easement for the purpose of navigation: *Washington Ice Co. v. Shortall*, 101 Ill.

The use of the water which belongs to the riparian proprietor, in case of its being congealed into ice, would give him the unlimited use of the ice as his exclusive property, and any stranger who enters upon the same and appropriates the ice will be liable in trespass *quare clausum fregit*: *Id.*

WILL.

Undue Influence as to Single Legacy.—Fraud or undue influence in procuring one legacy in a will does not invalidate other legacies not so procured: *Harrison's Appeal*, 48 Conn.

Where the issue is as to the fact of undue influence in procuring a will, and it appears that the undue influence was confined to a single legacy in the will, the jury may find under that issue the will void as to that legacy and valid as to the others: *Id.*

Probate—Conveyance by Executor—Subsequent Discovery of Later Will—Application of Purchase-money to Mortgage of Decedent—Bill to set aside Conveyance without Repayment of Purchase-money.—A sale of land duly made by order of a probate court having jurisdiction, and a conveyance thereof by the executor of a will duly admitted to probate, while his functions are in full force, to a *bona fide* purchaser for value, vests in such purchaser a good and valid title which is not affected by the discovery of a later will and its admission to probate and record: *Davis v. Gaines*, S. C. U. S., Oct. Term 1881.

When the purchase-money, paid by a purchaser in good faith, of real estate of a decedent ordered to be sold by a probate court, has been applied to the extinguishment of a mortgage executed by the decedent upon the property sold, and constituting a valid encumbrance thereon, and it turns out that the sale is irregular or void, the purchaser cannot be ousted of his possession, upon a bill in equity filed by the heir or devisee, without a repayment or tender of the purchase-money so paid and applied: *Id.*

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MECHANICS' LIEN ON PERSONAL PROPERTY.

(Continued from p. 185, ante.)

V. PRIORITY.—SUBROGATION.—It is a universal rule, that a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him, in a court of law or equity, to some subsequent claimant: *Rankin v. Scott*, 12 Wheat. 177.

A receiver is a person appointed for the preservation of the fund or property *pendente lite*, and for its ultimate disposal according to the rights and priorities of the parties; and the appointment of a receiver ordinarily gives no advantage or priority to the person at whose request the appointment is made, over the parties in interest: *Ellis v. Boston, &c., Railway Co.*, 107 Mass. 1; his possession is subject to all valid and existing liens upon the property at the time of his appointment, and does not divest a lien previously acquired in good faith: *Gere v. Dibble*, 17 How. Pr. 31; *In re N. A. Gutta Percha Co.*, Id. 549; *Denniston v. Chicago, &c., Railway Co.*, 4 Biss. 414. The rule in regard to the priority of equities is that he who has the prior equity in point of time has the prior right, and therefore a party resisting an equity in order to maintain his defence, must protect himself either under an older equity, or he must have purchased the legal title *bona fide*, without notice, for a valuable consideration which must have been paid.

The holder of a subsequent lien upon mortgaged chattels has

the same right to protect his interest in the property as if the prior lien be of any other nature, and may pay off the mortgage. An execution-creditor, upon the payment of a chattel mortgage which is a prior encumbrance upon the chattel on which his execution has been levied, is entitled to be subrogated to the rights of the mortgage; and he has the right to demand and receive an assignment of the mortgage, and the right to redeem from such mortgage attaches as soon as a lien is acquired by the levy of the execution, it is not postponed till after sale on the execution: *Lucking v. Wesson*, 25 Mich. 443.

VI. DURATION.—The right to hold property by lien lasts until the debt so secured is paid. The mechanics' lien on personal property is simply a security for the payment of a debt. Statutes of limitations being statutes of repose, suspend the remedy, but do not cancel the debt; and, therefore, when the security for a debt is a lien on property, either personal or real, the lien is not impaired in consequence of the debt being barred by the Statute of Limitations: *Higgins v. Scott*, 2 B. & Ad. 413; *Belknap v. Gleason*, 11 Conn. 160; *Thayer v. Munn*, 19 Pick. 538; *Spears v. Hartly*, 3 Esp. 81; *Crain v. Paine*, 4 Cush. 486; *Joy v. Adams*, 26 Me. 330.

VII. ENFORCEMENT.—At common law, a sale of the property to satisfy the debt secured by the lien, can be made only by the consent of the owner; if consent cannot be obtained, resort must be had to a court of equity: *Fox v. McGregor*, 11 Barb. 41. It is obvious that in many cases where the care of the property must be at the expense of the lien claimant, such remedy may be inadequate. To cure such defect, the modern tendency is to increase the efficiency of statute remedies, so as to make them adequate for securing those rights which the law means to give. If, however, the remedy given by statute is inadequate to secure the rights given by a lien, resort must be had to proceedings in equity: *Cairo & Vincennes Railway Co. v. Fackney*, 78 Ill. 116.

The proper action to be brought against one who has wrongfully taken and retains possession of personal property, is that of tort: *Matter of Hicks*, 20 Mich. 280; *Moses v. Arnold*, 43 Iowa 187; *Watson v. Stever*, 25 Mich. 386. But if one has taken possession of property and sold or disposed of it, and received money or

money's worth therefor, the owner is not compellable to treat him as a wrongdoer, but may affirm the sale as made in his behalf, and demand, in an action of assumpsit, the benefit of the transaction. Damages for a trespass are not in general recoverable in assumpsit; and in the case of taking personal property, it is generally held essential that a sale by the defendant should be shown: *Stearns v. Dillingham*, 22 Vt. 626; *Smith v. Smith*, 43 N. H. 536; *Pearsoll v. Chapin*, 44 Penn. St. 9; *Glass Co. v. Wolcott*, 2 Allen 227; *Emerson v. McNamara*, 41 Me. 565. And whenever trespass, trover or replevin will not lie, case can be sustained wherever there has been a *wrong done* by the defendant and a resulting injury to the plaintiff: *Low v. Martin*, 18 Ill. 290; *Upton v. Vail*, 6 Johns. 181; *Griffin v. Farwell*, 20 Vt. 151; *Ashby v. White*, Ld. Raym. 938; *Pasley v. Freeman*, 3 Term R. 63; *Sheldon v. Fairfax*, 21 Vt. 102; *Langridge v. Levy*, 2 M. & W. 519; *Weatherford v. Fishback*, 3 Scam. 170; *Bond v. Hilton*, Bushee (N. C.) 308; *Googins v. Gilmore*, 47 Me. 9. Property which is taken out of the operation of a chattel mortgage by a fraudulent contrivance of the mortgagor, is to all intents and purposes, wrongfully converted. The mortgagee loses it as effectually as if it had been destroyed or stolen: *Fenn v. Bittleston*, 8 Eng. L. & Eq. 483; *Forbes v. Parker*, 16 Pick. 462; *Manning v. Monaghan*, 23 N. Y. 539.

That a mortgagee of personal property may sue for an injury to his reversionary interest, see *Googins v. Gilmore*, 47 Me. 9; *Ayers v. Bartlett*, 9 Pick. 156.

VIII. WAIVER.—As the right of the lien-holder is merely that of retaining possession of the property, the legal title to which is in the general owner, any act not consistent with the right of possession by the lien-claimant, or title of the owner, is considered as a waiver of the lien: *Black v. Bogert*, 65 N. Y. 601; *McFarland v. Wheeler*, 26 Wend. 467; *Grinnell v. Cook*, 3 Hill 485; *Gurr v. Cuthbert*, 12 L. J., Ex. 309; *Bean v. Bolton*, 3 Phila. R. 87; *Pickett v. Bullock*, 52 N. H. 354; *Kitteridge v. Freeman*, 48 Vt. 62. Therefore, a voluntary surrender of the possession of the property subject to the lien, or a delivery to a third person, not procured by fraud: *Fouch v. Wilson*, 60 Ind. 64; or any other act inconsistent with the lien-claimant's possession, is a waiver: *Hall v. Tuttle*, 8 Wend. 374; *Waterston v. Getchell*, 5 Greenl.

485; *Spartali v. Benecke*, 10 Com. B. 212; 19 L. J., C. P.; 298. A lien-claimant, by parting with his dominion over the property so as to put it beyond his power to surrender it on demand to the general owner, on payment or tender of the debt, loses all right of lien thereto: *Ruggles v. Walker*, 84 Vt. 470. An express contract that a lien shall be retained to a specified extent is equivalent to a waiver to any greater extent: *Brown v. Gilman*, 4 Wheat. 255.

If one who has a lien on property for labor performed on it, delivers it to the owner or his agent without insisting on holding it as security, the lien is waived: *Ruggles v. Walker*, 84 Vt. 468; *Brackett v. Hayden*, 3 Shepley 347; and the owner of the property may sustain trespass for a subsequent taking of the property by a stranger: *Bailey v. Quint*, 22 Vt. 474. A voluntary abandonment of the possession is a waiver: *King v. Indian Orchard, &c.*, 11 Cush. 281. The delivery of possession necessary to divest a lien is such a delivery as would be sufficient under the Statute of Frauds to transfer the title. Delivery of part of the property subject to the lien does not impair the lien on the balance for the whole amount due: *Ruggles v. Walker*, 84 Vt. 468; *Palmer v. Tucker*, 45 Me. 316; *Partridge v. Trustees, &c.*, 5 N. H. 286.

A voluntary surrender of the possession with intent, express or implied, is necessary to constitute a waiver. A delivery procured by fraud does not destroy the right: *Walcott v. Keith*, 2 Fost. 196; and if possession be regained without the doing of legal wrong, the lien will be in force: *Johnson v. The McDonough*, 1 Gilpin 101. A party who has relinquished a prior lien through fraud practised on him, may rescind the agreement for relinquishment, and retake the property by virtue of his prior lien: *Lynch v. Tibbitts*, 24 Barb. 51. Delivery of property by the lienholder, and payment of the debt by the owner, are concurrent acts, and neither party is bound to perform his part of the contract unless the other is ready to perform the correlative act: *Frothingham v. Jenkins*, 1 Cal. 42; *Bigelow v. Heaton*, 4 Denio 496. To destroy a lien, the surrender of the possession of the property must be voluntary; but it may be sold on execution subject to the lien, and it seems the lien-holder may be required to permit its exposure for sale in that manner; and if the lien-claimant voluntarily surrenders the property to the officer who has the execution against the owner, the officer may remove and sell

the same, but not to the prejudice of the lien: *Glassner v. Wheaton*, 2 E. D. Smith 352.

When possession of the property is demanded by the owner or other person lawfully entitled to it, the party who claims the possession by virtue of his lien should state its nature and amount: *Heine v. Anderson*, 2 Duer 318; for if a ground of retention different from that of the lien, and inconsistent therewith, is taken, the lien ceases to exist: *Hanna v. Phelps*, 7 Ind. 21; and the owner of the property may sue the lien-claimant and recover without having first tendered to him the amount of the debt: *Saltus v. Everett*, 20 Wend. 267.

IX. DISCHARGE OR DETERMINATION.—The payment of the debt, or performance of any obligation secured by the lien, will discharge it. A tender of the amount secured by the lien is equivalent to payment as to all things which are incidental to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities. The debt still remains, but the lien is gone absolutely and for ever: *Kortright v. Cady*, 21 N. Y. 366, and cases cited; *Chick v. Willetts*, 2 Kan. 385; *Caruthers v. Humphreys*, 12 Mich. 270; *Ladue v. D. & M. Railway Co.*, 13 Mich. 393; *Ketchum v. Crippen*, 37 Cal. 223; and this rule applies to a lien created by an execution: *Tiffany v. St. John*, 65 N. Y. 314.

A valid tender is a formal offer to perform that which is due from the party making the offer. In *Moynahan v. Moore*, 9 Mich. 9, it was decided that a tender of the amount due, on condition that the property be delivered up, is not a conditional, but a valid, tender. The facts were that the plaintiff employed the defendant to repair a carriage, and the defendant retained the carriage, under a mechanic's lien, for the amount due him for making such repairs. To obtain possession of the property, the plaintiff tendered, as the jury found, sufficient to discharge the lien. On the facts thus presented the court says, "This tender necessarily operated to release the property, and the plaintiff was entitled to immediate possession of it. That such would be the effect of an unconditional tender is not doubted; but, as the tender in this case was made upon condition that the carriage should be delivered up, it is thought that it has not such effect. A tender made to procure the possession of property can hardly be called

conditional because it is accompanied by a demand for the property. But it does not appear that any objection was made to the tender by the defendant, except for insufficiency—he demanding more than the sum offered; and, as the jury find that sufficient was tendered, the tender was good, even were the strictest rule to prevail, upon the established principle that the objection made at the time of tender precludes all others; and if that be not well grounded, the tender will be held good.” The tender being sufficient, the lien was lost, and the owner was held entitled to maintain an action of replevin for his property without payment of the tender into court; the court saying upon this point, “Were this an action by the defendant to recover compensation for the repairs, the want of the money in court would render the tender nugatory, as the effect of tender in such cases is to stay interest and relieve from costs, and therefore the party making the tender must always have the money within reach of his creditor. But in this case the tender having once operated to discharge the lien, it is gone forever, and nothing could revive it. The reasons which require the money to be brought into court do not apply in such a case. By refusing to receive the money tendered, the defendant lost his lien, and can only rely upon the personal liability of the plaintiff.

A lien may be lost by releasing property upon the mere request of a third party who promises to pay the debt for which the property is held, although such promise is not binding, because it is collateral and within the Statute of Frauds, which requires such an undertaking to be evidenced by writing: *Mallory v. Gillett*, 21 N. Y. 412; *Corkins v. Collins*, 16 Mich. 478. A lien may be lost by negligence: *Hanna v. Holton*, 78 Penn. St. 334; and a lien is discharged, the performance of which has been fraudulently prevented by the lien-claimant: *Carey v. Brown*, 92 U. S. 171.

X. WHO MAY SUE FOR INJURY.—Either the general owner or the party who holds the property under the lien, may maintain an action in respect to it against a wrongdoer: *Green v. Clarke*, 12 N. Y. 343; *Edwards v. Frank*, 40 Mich. 616; the latter by virtue of his right of possession: *Wingard v. Banning*, 39 Cal. 546; the former by reason of his ownership: *Crouch v. Railway Co.*, 2 Car. & K. 801. If property in the possession of the lienor is destroyed without his fault he may recover the debt: *Russell v. Koehler*, 66 Ill. 459. When property to which a party has, by

statute, a lien, but not the right of possession, is destroyed or so changed by a stranger that the lienor cannot enforce his lien, he may maintain an action on the case against the wrongdoer: *Hussey, Adm'r, v. Peebles*, 53 Ala. 432.

XI. WHO MAY BE SUED FOR INJURY.—Upon tender of payment by the owner, the lien ceases: *Tiffany v. St. John*, 65 N. Y. 314; *Moynahan v. Moore*, 9 Mich. 9; and if the party holding under the lien refuses to return the property, the owner may recover the possession, or sue for a conversion: *Stearns v. Marsh*, 4 Denio 227. The owner may maintain a joint action against both the bailee and his agent, or a separate action against either, for an injury caused by the negligence of the agent: *Phelps v. Wait*, 30 N. Y. 78; and a recovery either by the owner or the bailee is a bar to another action by other parties: *Baird v. Daly*, 57 N. Y. 236. If the owner refuses to perform his part of the contract, he may be sued and the property retained as collateral security until the debt shall be recovered: *Jones v. Conde*, 6 Johns. Ch. 77; *Payne v. Harrell*, 40 Miss. 498; *Gerrard v. Moody*, 48 Ga. 96. A suit may be maintained against a party through whose negligence a lien has been lost: *Hanna v. Holton*, 78 Penn. St. 334; *Halpin v. Hall*, 42 Wis. 176.

XII. DAMAGES RECOVERABLE.—When suit is brought by the owner for conversion, against a defendant who has a lien on the property to secure a debt, the amount of the lien should be deducted from the value of the property: *Chamberlain v. Shaw*, 18 Pick. 283; *Outcalt v. Durling*, 25 N. J. L. 443; *Neiler v. Kelley*, 69 Penn. St. 403. But when the plaintiff has a lien, and is responsible to a third party, or if the defendant is not entitled to the balance of the value of the property subject to the lien, the plaintiff is entitled to recover the whole value: *Chamberlain v. Shaw*, 18 Pick. 278; *Adams v. O'Connor*, 100 Mass. 515; *Davidson v. Gunsolly*, 1 Mich. 388.

If the plaintiff has only a lien on the property, and the defendant is the owner subject only to the lien, the plaintiff can recover only the amount of his claim: *White v. Webb*, 15 Conn. 302; *Brownell v. Hawkins*, 4 Barb. 491; but against a stranger, if he had possession or the legal title for the purposes of his lien, he can recover full value of the property: *Adams v. O'Connor*, 100 Mass. 515; *White v. Webb*, 15 Conn. 302.

In an action of replevin, whatever damages have been actually sustained, may be recovered: *Gibbs v. Cruickshank*, Law Rep., 8 C. P. 454, 460. Therefore, where the property in controversy has a usable value, the value of the use of the property during its wrongful detention is a proper item: *Yandle v. Kingsbury*, 17 Kan. 195; *Allen v. Fox*, 51 N. Y. 567; *Butler v. Mehrling*, 15 Ill. 488; *Williams v. Phelps*, 16 Wis. 80; and in some cases, deterioration of the property from injury, neglect or other causes: *Washington Ins. Co. v. Webster*, 62 Me. 341, must be considered; also, oppression and vexation may be regarded: *Herdic v. Young*, 55 Penn. St. 176; *Cable v. Dakin*, 20 Wend. 172; see *Stevens v. Tuttle*, 104 Mass. 328, 335. In an action of replevin, the plaintiff continues to be the absolute owner of the property, if he was the owner previously, and he cannot elect in such action to take the value of the property instead of the property: *Wilson v. Fuller*, 9 Kan. 176. In an action of trover, the plaintiff elects to consider the property taken, if the property is still in existence, as having become the property of the defendant, and he himself is the owner of nothing but the mere value of the property, which value he seeks to recover, with legal rate of interest thereon: *Id.* The plaintiff must have the legal title to the property in question, and must show possession or the right to immediate possession. It is not enough that he shows an equitable title, such as a right to redeem, or a reversionary interest: *Ring v. Neale*, 114 Mass. 111.

When property is sold by a lien-holder contrary to the terms of the contract by which the lien was created, the measure of damages is the market value of the property at the time it was sold: *Belden v. Perkins*, 78 Ill. 449. When an action is brought against the lien-holder for the value of the property sold, he may recoup the amount of the debt secured by the lien: *Belden v. Perkins*, *supra*. And see *James v. Rogers*, 15 Mass. 389; *Stearns v. Marsh*, 4 Denio 227; *Platt v. Brand*, 26 Mich. 175. And the same rule applies where suit is brought against the purchaser: *Belden v. Perkins*, *supra*, and a defendant may recoup the amount of damage occasioned by the negligence of the bailee: *Sargent v. Slack*, 47 Vt. 674.

JOSEPH H. VANCE.

Ann Arbor, Mich.

RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

HENRY LEWIS ET AL. v. THOMAS McCABE ET AL.

In Connecticut a condition annexed to a sale of goods that the title shall not pass to the vendee until payment of the price, is valid as against the vendee's creditors.

Nor is such condition necessarily rendered invalid as to creditors by the fact that the property is of such a nature that it will be consumed in the use, and that the vendee is authorized to dispose of it before payment of the price.

In such case, if the vendee is authorized to dispose of the property *as his own*, the condition for the retention of title by the vendor will be void, but if the vendee is simply authorized to transfer the title of the vendor the condition will be good.

Where the condition for the retention of title by the vendor is express and positive, the court will construe an authority given to the vendee to dispose of the property as simply an authority to transfer the vendor's title.

ERROR to the Common Pleas of Hartford county. Case stated setting forth the following facts:

On June 15th 1880, at New Britain, plaintiffs made to one McAvoy a conditional sale of two and a half barrels of liquors, and on July 9th 1880, a conditional sale of one barrel of liquor. All of said merchandise was immediately placed in McAvoy's possession.

It was an express condition of both said sales that the title to said merchandise should not vest in the said vendee until the merchandise was fully paid for, and until such payments were made the title to said merchandise was to be and remain in said vendors.

On October 9th 1880, said merchandise was attached as the property of McAvoy in a suit brought against him by defendants. At the time of the attachment the two and a half barrels of liquor sold June 15th remained intact. The one barrel sold July 9th had been opened a few days before and a small quantity of liquor drawn therefrom and sold. It was the intention of McAvoy to have paid for all said merchandise on the day after said attachment was made, when the agent of plaintiffs was expected to be in New Britain.

Said McAvoy is a retailer of liquors, and it was supposed by the parties that said merchandise would be used in his business, and in case any of said merchandise should have been sold and consumed before the conditions of sale were complied with, the

vendors could only enforce their condition against such portion thereof as might remain unsold.

No payments had been made upon the merchandise at the time of the attachment. Plaintiffs made a demand on the officer serving the attachment to return the goods, and also requested defendants to pay the amounts unpaid thereon, but both of these requests were refused.

If the condition attached to the sales of said merchandise was valid and operative in law, judgment to be rendered for the return of said merchandise, otherwise for the defendants.

The court below entered judgment for defendants, whereupon plaintiffs took this writ of error.

Mitchell & Hungerford, for plaintiffs.

John Walsh, for defendant.

The opinion of the court was delivered by

LOOMIS, J.—There is much contrariety of reasoning and decision relative to the validity of what are called conditional sales in different states, and often to some extent in the same state.

The courts of Pennsylvania have most firmly established the rule that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, is fraudulent and void as to creditors of the vendee and innocent purchasers; but they are obliged to except cases of bailment where no present contract of sale is regarded as made, and they have often found difficulty in distinguishing between cases that lie near the border line separating sales from bailments, where there is a condition upon which the bailee may become the owner. See *Statfield v. Huntsman*, 10 W. N. C. 216; *Brunswick v. Hoover*, Id. 219, and cases there cited.

The courts of New York seem to concur with those of Pennsylvania in holding conditional sales void as to purchasers: *Steel-yards v. Singer*, 2 Hilton 96; *Smith v. Lynes*, 1 Seld. 41; *Haggerty v. Palmer*, 6 Johns. Ch. 437; but differ by giving effect to them against levies made by creditors and assignments in trust, or as security for the payment of antecedent debts: *Haggerty v. Palmer*, and *Smith v. Lynes*, *supra*; *Keeler v. Field*, 1 Paige 312; *Herring v. Hoppock*, 15 N. Y. 409; *Beaver v. Lane*, 6 Duer 232; *Wait v. Green*, 35 Barb. 585. But where the agree-

ment confers on the conditional vendee the right to sell, or a right inconsistent with continued ownership of the original vendor, the courts of New York pronounce the transaction fraudulent as against both creditors and purchasers: *Ludden v. Hazen*, 31 Barb. 650; *Bonesteel v. Flack*, 41 Id. 435; *Powell v. Preston*, 1 Hun 513. In Maine, Vermont and Massachusetts the condition that the right of property shall remain in the vendor until payment, is held good not only as between the original parties, but also against purchasers from the vendee, and creditors of the latter, even when possession goes with the sale, and there is nothing to indicate that it was not absolute.

In all the cases of this class that have hitherto been considered by this court, the court has uniformly and consistently applied the principle embodied in the ancient maxim "that when a man hath a thing he may condition with it as he will:" 1 Shep. Touch., p. 118.

In the leading case of *Forbes v. Marsh*, 15 Conn. 384, WILLIAMS, C. J., in delivering the opinion, cited several cases decided by the courts of Massachusetts, and added: "It is claimed, however, that these and many other cases of a similar character, are peculiar to that state. The court think otherwise, and that they are based upon the principle of the common law, which construes contracts according to the intention of the parties, and allows men to contract according to their own pleasure, unless contrary to the policy of the law or certain technical rules. The owner may dispose of his property to whomsoever he pleases at any time and in any manner: 2 Black. Com. 447. When he relies upon his remedy, it is but just that he should be left to it according to his agreement; but, on the contrary, there is no reason why a man should be forced to trust where he never meant it: HOLT, C. J., in *Thorpe v. Thorpe*, 1 Salk. 171. For the agreement of the minds of the parties is the only thing the law respects in contracts: Plowd. C. 140." * * * "The rule of law making the property of one man liable for the debts of others in whose hands it is found, is applicable particularly to that property which was once owned by the possessor, and is by him sold or mortgaged to another, and then suffered to remain in his possession. In such cases possession is evidence of fraud, because there is not given to the world the usual evidence of a change of title. The vendor, or mortgagor, is therefore presumed to remain owner of the pro-

perty as theretofore. It is otherwise in cases like that before us. The vendee comes into possession of property which was known to belong to another man. Whether, therefore, the vendee had borrowed it or hired it or purchased it, becomes a matter of inquiry, and ought to be ascertained by him who proposes to trust his property upon the faith of this appearance; for the law offers its protecting shield to those who attempt to protect themselves. Accordingly we find that all these cases of conditional sales made *bona fide* have been held good as against attaching creditors as well as against the parties." This case and its doctrine have been re-affirmed in *Cragin v. Coe*, 29 Conn. 51; *Hart v. Carpenter*, 24 Id. 427; *Tomlinson v. Roberts*, 25 Id. 477; *Hughes v. Kelly*, 40 Id. 148, and *Brown v. Fitch*, 43 Id. 512.

But it must be observed that these cases, while firmly sustaining the condition and protecting the title of the original vendor against all other parties, do not directly involve the precise question now presented. Those cases are all distinguishable from this in two particulars—the property was of a nature not necessarily to be consumed in the use; and there was no sort of concession on the part of the original vendor that the conditional vendee might dispose of the property without first paying the price agreed upon. Both these elements, to some extent at least, exist in the present case, and occasion hesitation on the part of the court as to the validity of the condition as against the creditors of McAvoy.

The finding bearing upon the question is as follows: "It was an express condition of both sales that the title to said merchandise should not vest in the said vendee until the merchandise was fully paid for; and, until such payments were made, the title to said merchandise was to be and remain in said vendors." * * * "Said McAvoy is a retailer of liquors, and it was supposed by the parties that said merchandise would be used in his business; and, in case any of said merchandise should have been sold and consumed before the conditions of sale were complied with, the vendors could only enforce their condition against such portion thereof as might remain unsold."

Under such an agreement, after the property has been attached by creditors, will the law consider it as belonging to the plaintiff or to his conditional vendee, McAvoy?

If we invoke the aid of the courts of other states to give an answer to this question we find decisions of the highest courts

of Maine, Vermont and Massachusetts protecting the title of the original vendor under agreements substantially the same as the one we are considering.

In *Rogers v. Whitehouse*, 71 Me. 222, goods were bought by a retail trader upon condition that the property should not vest in him until they were fully paid for, but with an understanding between the parties that they were to go into the store of the conditional purchaser and be sold by him in the regular course of trade; and it was held that they did not pass to the assignee, in insolvency of the latter, for the benefit of his creditors, although the original vendor would have been estopped to deny the title of those who might purchase portions of them of the retailer in the regular course of his business; and it was distinctly held that it was not essential to the existence and validity of such a condition that the conditional vendor should have no right to sell to others. BARROWS, J., in giving the opinion, said: "We see no legal objection to a wholesale dealer making a conditional sale to a retailer with the understanding that he may dispose of the goods as they may be called for at retail, but that, as between themselves, the property shall not pass until the goods are paid for; and, in such case, while the purchaser at retail would get a title which the original vendor could not impeach because of his agreement with the retailer, it would be the title of the original vendor, and not that of the retailer, who has none, and can convey none, except in the manner which his arrangement with the vendor permits."

In *Armington v. Houston*, 38 Vt. 448, the plaintiff sold one Thompson provisions on a condition made in good faith that they were to remain the property of the plaintiff until paid for, but with the understanding that Thompson might consume them in his family. The defendant, a constable, attached the provisions in behalf of a creditor of Thompson. Held, that the condition was valid, and the title to the goods remained in the plaintiff until they were paid for or consumed. KELLOGG, J., in delivering the opinion of the court said: "It was the unquestionable right of the plaintiff to sell this property to Thompson upon the condition that, until payment of the price, the property should remain the plaintiff's. The retention of the title to the property is not a fraud upon any person, and such a contract is one which every person has a right to make. In a conditional sale, the

possession of the property is ordinarily transferred to the vendee, and very frequently with expectation of both of the parties to the sale that the property will be used by the vendee; but, in such cases, the vendee is, until the performance of the condition, only a bailee of the property for a specific purpose, and he acquires no property in the goods from the possession merely. This right rests upon the agreement of the parties, and their intention in making the contract of sale is to be carried into effect, if the transaction was entered into in good faith, unless the contract is one which contravenes some established rule of law."

Of the Massachusetts cases, the one most in point is *Burbank v. Crooker & another*, 7 Gray 158, where there was a sale and delivery of a stock of goods to a shopkeeper to be put into his shop for sale, but upon condition that the title should not vest in him until payment of the price, and it was held that the title did not pass, and the condition was operative as against even a purchaser from him of the whole stock of goods; although it was also held that had a sale been made of individual articles in the ordinary course of business in a country store, the plaintiff might have been estopped to assert any right adverse to such purchaser, having placed them in the hands of such dealer with the understanding that they were to be thus used.

The New York cases already referred to render it probable that the courts of that state would declare such a condition inoperative, although there is a distinction of some significance between the case of *Ludden v. Hazen*, *supra*, on which the defendant relies, and the case at bar, in this—that in the former, the vendee, to use the language of the court, was to "run his unlicensed grocery upon borrowed whiskey," all of which, by the terms of the agreement, was to be paid for only when sold, showing that a sale by the grocery man was the most prominent part of the contract. In so flagrant a case, it might well be held that the condition was colorable, fraudulent and void. We concede, however, that the reasoning contained in the opinion renders it probable that the contract we are considering would in that state be declared void against purchasers and creditors.

The finding in the case now under consideration leaves it a little in doubt how far the parties contemplated any use of the liquors in McAvoy's business until paid for by him, and it appears that, although the latter had had possession for several months, yet all

the packages remained intact except one, which was opened, and a small quantity drawn therefrom a day or two before the attachment, and on the day after the attachment full payment was intended to be made to the agent, who was then expected in New Britain.

But conceding that the parties actually contemplated that there might be some sales made before actual payment of the price, yet the terms of the agreement, coupled with the conduct of the conditional vendee in pursuance of it, evince the perfect good faith and *bona fide* character of the transaction, so that it cannot be pronounced void on account of any wrong intent of the parties. If, therefore, the condition is to be held inoperative at all, the law must so declare it upon grounds of public policy, because it was calculated to give the one clothed with the possession a false credit, or else upon the ground that the plaintiffs, through their contract, are to be regarded as holding the possessor or conditional vendee out to the world as absolute owner.

The objection as to giving a false credit has undoubtedly much force, so that in several states the courts consider it as sufficient, but it applies with more or less strength, according to the circumstances, to all cases of conditional sales where the vendee is clothed with full possession and apparent ownership, but as the court says, in *Forbes v. Marsh*, *supra*, in this state, "all these cases of conditional sales made *bona fide* have been held good against attaching creditors;" and in reply to the objection we are considering, it warns persons against putting faith in appearances, except where the case comes within the rule of the vendor's retaining possession after the sale, and persons about to give credit on the faith of such appearances must make inquiry. In this respect the language of our courts is similar to that of CAMPBELL, J., in giving the opinion in *Ketchum & Cummings v. Brennan*, 53 Miss. 596. "A buyer must beware of purchasing from one who has not title; possession is not title."

The other objection, as to holding out the possessor to the world as absolute owner, is involved partly in the one just considered, except so far as the contract in question must be construed as contemplating or authorizing a sale by the possessor.

Possession, with the *jus disponendi*, added, has been regarded by many courts as a sufficient reason for declaring a contract colorable and fraudulent, without regard to the real intent of the

parties: Bump on Fraudulent Conveyances, p. 123, and cases there referred to.

We concede that there is much force in the reasoning supporting such a rule, but at the same time we must bear in mind the spirit and drift of our own decisions, as they may have induced the making of such contracts. While it is true, as already stated, that no case identical with the present in the particular feature we are now considering has hitherto been before this court, yet the cases referred to clearly show that the controlling consideration has been the *bona fide* character of the transaction and the honest meaning and intent of the parties, without applying any technical rule of public policy, as in the case of a retention of possession by the vendor after a sale.

The courts of Massachusetts and Connecticut have always been in harmony on this vexed subject, and the principles hitherto adopted by us, if they do not logically compel, yet very naturally lead, to the same result as already reached in that state, where the title of the original vendor has been protected, notwithstanding the objection we are considering.

If, however, the contract in question must be construed to mean that the plaintiff authorized McAvoy to sell the property as his own, we should be constrained to hold it so absolutely inconsistent with the retention of the title in the plaintiff as to waive or make void the condition. But in this case the condition that no title was to pass until payment is so clear, express and positive in its terms, that we are inclined to give it full effect, and to construe what is afterwards said of the understanding of the parties relative to a sale, as the court in *Rogers v. Whitehouse*, *supra*, did, that is, the authority is not to sell as his own (having nothing himself), but simply to transfer the title of the plaintiff in the manner authorized.

There was error in the judgment complained of, and it is reversed.

CARPENTER, J., dissented.

It is proposed briefly to consider the law with regard to transactions on the border line between bailments and sale; transactions which are growing daily more frequent and various. The questions arising out of them must ever be

of the greatest importance, not only to buyer and seller or bailor and bailee, but to third persons, second purchasers and creditors, whose rights depend so largely upon those of the original parties. The subject has lately been brought

prominently to the notice of the profession by the two decisions of the Supreme Court of Pennsylvania, referred to in the principal case, viz. : *Brunswick v. Hoover*, 10 Weekly Notes Cases 219, and *Stadfeldt v. Huntsman*, Id. 216. The law of the state, upon this point, where these two cases arise is of early origin, and may be said to begin with the case of *Murgatroyd v. Crawford*, 2 Yeates 420 ; 3 Dall. 491. An action was brought upon a policy of insurance of the ship "Mount Vernon." The facts, as stated in the charge of Judge SHIPPEN, as reported in Dallas, were as follows : An Englishman, Duncanson by name, had come here to settle, and taken the oath of allegiance to Pennsylvania, but had not been long enough in the country to entitle him to naturalization. He applied to Messrs. Willis and Francis to get him a vessel with which to trade with India, private trade with that country being prohibited in England as an infringement of the government monopoly. Messrs. Willis and Francis purchased the "Mount Vernon," and a bill of sale was made out to them by plaintiff. It then occurred to Duncanson, that as he had not yet acquired American citizenship, he was not in a position to trade as he wished with safety. Hence, the bill of sale was sent back, and a new contract entered into substantially as follows : The plaintiff should remain the owner of the ship, and as such retain the register and make the insurance ; she should, however, be delivered to Duncanson or his agents, and the plaintiff should empower a passenger on her to assign and transfer the ship to Duncanson in England, on September 1st, by which time he would be an American citizen. Purchase-money to be secured by notes of Willis and Francis, payable at all events, in instalments. The present insurance was effected by plaintiff as owner of the ship. In Yeates, Judge SHIPPEN is reported as saying, "Either a delivery of a

chattel contracted for, or payment of the consideration money will effect a change of property, where such is the intention of the parties ; but where the parties do not contemplate such a change, but expressly guard against it by contract, it would seem strange that the property should pass from the one to the other contrary to the declared will of both." The crucial point in the case, however, was whether or not the arrangement was an evasion of a certain United States statute. In *Murgatroyd v. Crawford*, it was held not to be such an evasion. But in *Murgatroyd v. McLure*, 4 Dall. 342, Justice CHASE of the United States Circuit Court arrived at an opposite conclusion, and in *Duncanson v. McLure*, 4 Dall. 308, the judges retracted their opinion in *Murgatroyd v. Crawford* with regard to the statute ; but they did not impugn the correctness of their position as to the general law governing such contracts.

The case of *Martin v. Mathiot*, 14 S. & R. 214, may be considered the leading case in Pennsylvania on the subject. It was decided, some thirty years later than the last-mentioned case and the conclusion reached was different. The case was this : Martin brought trespass against Mathiot, sheriff, for seizing four wagon horses. The defendant justified the seizure under a *fi. fa.* commanding him to levy a certain debt upon the property of one Michael. The question was whether the property was Martin's or Michael's. It was proved that the horses were, and had been for some time, in the possession of Michael, who was a wagoner. Before they came into his possession they were the property of the plaintiff. The defendant gave evidence that Michael stood charged on the books of the plaintiff with a debt, amounting to upwards of \$60, and that the plaintiff, upon being asked whether Michael was the owner of the horses he was driving, replied that he was, provided he should

pay that debt. The opinion of the court below was, that if vendor and vendee agree that possession shall go to the vendee but the property remain in the vendor until the whole purchase-money is paid, such agreement, as respects creditors and the sheriff, is fraudulent. In affirming the judgment Chief Justice TILGHMAN said: "I cannot say that I perceive any error in the opinion of the Court of Common Pleas. Possession of personal property is the great mark of ownership. It is almost the only index which the world in general has to look to. But there are exceptions. There are certain necessary and lawful contracts by which the owner parts with the possession, and yet fraud cannot be presumed. Such are the contracts of lending and hiring, both very useful, and without which society cannot well exist. * * * No suspicion of fraud can fairly arise where the transaction is in the usual course of business. But the case is very different where it is intended that the property should be apparently in one, while it is in fact in another. This is out of the usual course of business, unnecessary, and directly tending to the injury of those who are not in the secret. * * * All the world had a right to suppose that he [Michael] was the owner of the team which he drove, and a secret agreement to the contrary was a fraud upon society, by giving the wagoner a false credit which might induce others to trust him with their property. The cases which have generally been brought before the courts of justice are those in which the seller has remained in possession; I will refer particularly to *Clow v. Woods* and *Babb v. Clemson*. * * * The principle which governed them was that a sale where possession does not accompany and follow it is fraudulent as to creditors. It was the separation of the possession from the property which made the fraud; and the principle applies to the case before us. * * * The mischief is the

same—a false credit is given." It will be seen that Judge TILGHMAN regarded the contract as fraudulent in law, and used language very different from that in *Murgatroyd v. Crawford*; and the only authorities referred to are *Clow v. Woods*, 5 S. & R. 281, and *Babb v. Clemson*, 10 Id. 419. *Clow v. Woods*, now a leading case, was an action of trespass against the sheriff. The defendant in the execution under which the sheriff made the alleged wrongful sale, had mortgaged the goods sold—vats, tanner's tools, leather, &c., to the present plaintiff, the deed containing a proviso that the goods should remain in the mortgagor's possession to enable him to finish tanning the leather. While in the possession of the mortgagor under the agreement, the goods were levied upon to satisfy a judgment obtained against the mortgagor by a third person. The sheriff had notice of the mortgage one day prior to the sale. It was held that, as there had been no delivery of the mortgaged property to the mortgagee, the mortgage though good as between the parties was void as to creditors, the possession of the mortgagor being fraud *per se*. But in the course of a careful opinion, Judge GIBSON said: "I can see no objection to an absolute sale of an article undergoing manufacture to be delivered when finished. * * * If, however, the transactions were industriously kept secret, it would amount to actual fraud." The fatal defect in *Clow v. Woods*, and that upon which Judge GIBSON bases his decision, is that the mortgaged goods were not scheduled. Judge DUNCAN, who also delivered an opinion in the same case, discusses the question as to whether retention of possession under such circumstances is fraud *per se*, or merely a badge of fraud to be considered by the jury. He says, "The distinction courts have taken is, between a deed purporting on its face to be an absolute deed, so

that the separation of the title from the possession is incompatible with the deed itself, and a deed upon condition, which does not entitle the vendee to possession. An absolute deed without possession is in point of law fraudulent. When possession is inconsistent with the deed, it is a fraud in itself to be determined by the court." This is a strong, indeed, a direct, implication, that where the agreement and the possession are compatible, fraud is a question for the jury. *Babb v. Clemson*, 10 S. & R. 419, also cited by Judge TILGHMAN, was a suit against the sheriff for the value of certain goods levied on by him. The plaintiff's claim was based upon an assignment of the goods to her by the defendant in the execution prior to the levy. The defendant remained in possession after the assignment. The point decided is correctly stated in the syllabus, as follows: If the owner continue in possession after an absolute assignment of the goods, it is a fraud *per se*, unless the possession is according to some conditions or trust expressed in the deed. It is upon these two cases that the decision in *Martin v. Mathiot* rests, and with every respect for so able and learned a jurist as Judge TILGHMAN, they can hardly be said to warrant it. Especially in view of the earlier law in Pennsylvania, which was much less strict with regard to fraudulent possession than that in England: *Daves v. Cope*, 4 Binn. 258; *Levy v. Wallis*, 4 Dall. 197; *Waters v. McClellan*, Id. 208; *Chancellor v. Phillips*, Id. 213; *Wilt v. Franklin*, 1 Binn. 502. *Martin v. Mathiot* practically avoids the payment of money as a condition precedent to the vesting of property in the vendee, as to purchasers and creditors, where possession has been given him. Neither *Clow v. Woods*, nor any of the earlier authorities, sustain this. All of them except from the rule as to fraudulent possession cases where there is a condition expressed in the deed, even though as

a matter of fact the possession is equally deceptive in both cases. The early authority most nearly in point which I have been able to find is *Murgatroyd v. Crawford*, *supra*, with which *Martin v. Mathiot* certainly does not agree. A strikingly similar case arose some years later, where there had been an agreement to sell a boat, with the condition that it should remain the vendor's property until the instalments were paid. The vendee was in the employ of the vendor as boatman. Some of the instalments had been paid, and the vendee was in possession. The creditors of the vendee levied upon the boat, and the court below, upon the authority of *Martin v. Mathiot*, pronounced the agreement a fraud *per se*, as to the vendee's creditors. This judgment was reversed, Judge GIBSON distinguishing *Martin v. Mathiot*, upon the ground that in the present case, the possession of the vendee, since he was in the vendor's employ, was the possession of the vendor, and therefore not delusive: *Lehigh Co. v. Field*, 8 W. & S. 241.

It seems decided beyond question, in Pennsylvania, that where there is a present sale and delivery, no agreement to continue the property in the vendor, or to preserve his lien, will avail: *Jenkins v. Eichelberger*, 4 Watts 121; *McCullough v. Porter*, 4 W. & S. 178; *Trovillo v. Shingles*, 10 Watts 438; *Früchett v. Cook*, 62 Penn. St. 193. The difficulty is in determining what is and what is not a present sale. It was found that to apply the doctrine of *Martin v. Mathiot* to all cases of the kind would work injuriously, and before long there appear two lines of cases, one governed by *Martin v. Mathiot*, and limited to cases where there is a delivery to the vendee with retention of title by the vendor simply for his security or convenience, and the other composed of those cases wherein there appears to have been some further motive for the delivery, either that the

vendee should have the use of the property as bailee for hire, with a right to buy absolutely at the end of the time, or continue in possession as the servant or agent of the vendor with the right to pay for and become owner of the property at a future time. The cases just cited are examples of the first line, and to them may be added *Stadfeldt v. Huntsman* and *Brunswick v. Hoover*, *supra*. The distinction between the two lines is clear enough in principle, but as before remarked, the difficulty arises when it is proposed to apply the principle to given circumstances. *Martin v. Mathiot* and kindred cases would seem to stamp as illegal, or more properly, void as to third persons, any contract no matter how worded, which gives the vendee possession, and retains the ownership in the vendor for his security or that of the vendee. It has also been held in several cases, beginning with *Myers v. Harvey*, 2 P. & W. 478, that property bought at sheriff's sale may be left with the defendant, *loaned or hired*, without subjecting to sale again as his property. But where there is an *agreement to resell* it to the defendant, be the sale conditional or absolute, his creditors may again sell it: *Heizman v. Divil*, 11 Penn. St. 264; *Dick v. Cooper*, 24 Id. 217; *Waldron v. Haupt*, 52 Id. 408.

The case of *Clark v. Jack*, 7 Watts 375, may be said to begin the line of cases held not within the principle of *Martin v. Mathiot*. The agreement was: "Articles of agreement made and concluded this 4th day of June, in the year of our Lord 1836, between William Jack of the one part and Richard Arthurs and C. J. Durham of the other part, witnesseth, that in consideration of \$145 paid Lewis P. Durham for the said Jack, in hand by the said Arthurs and Durham, the said Jack agrees to sell two years from this date unto the said Arthurs and Durham all of the law library which the said Jack bought of Lewis P. Durham. And the said Arthurs and

Durham agree to pay a certain judgment bond in which said Jack, Arthurs and Durham are jointly bound unto the said L. P. Durham for the sum of \$200 with interest, which payment shall be in full satisfaction of the said books. And further, the said Jack agrees to let the said Arthurs and Durham have the use of the said books until that time, and the said books not to be taken out of Brookville, Jefferson Co." This was held a bailment, with a superadded contract to sell, and the possession in no wise fraudulent. So in *Rose v. Story*, 1 Penn. St. 190, where the agreement was for the sale of horses to be paid for in instalments (several of which had been paid), the animals to remain the property of the vendor until final payment, the contract was held valid as against the vendee's creditors on the ground that as he was in the employ of the vendor, and continued to use the horses in his work about the premises, there was nothing deceptive in his possession. See also *Lehigh Co. v. Field*, *supra*. In *Rowe v. Sharp*, 51 Penn. St. 26, the agreement was a lease of billiard tables for a certain period, lessee to redeliver them in good condition, lessors to make out a bill of sale at the end of the term if there had been no default in paying the instalments of rent. Three days prior to the execution of the lease, the lessee agreed to purchase the tables of the lessor for \$750. He paid cash \$200, and the balance \$550 was the amount mentioned as the total rent in the lease. A bill of sale was made out at the time of the agreement to purchase, though not signed. This case affords a curious example. No one can fail to see that the effect and intention of the lease were simply the security of the vendor. Yet the agreement was held lawful, and the delivery to the lessees or vendees simply a bailment, upon the authority of *Clark v. Jack*, *supra*. *Rowe v. Sharp* is upon the border line, and is hardly sustained, certainly not ruled, by *Clark v. Jack*

Enlow v. Klein, 79 Penn. St. 488, is also an important case. The agreement was that Enlow should "furnish" Moritz with horses, wagons, &c., suitable for peddling. Moritz to pay him \$5 per week for two hundred weeks, the property to belong to and be managed by Enlow until the last payment. Moritz to keep the articles in repair, and replace any horse which might die. Enlow to relinquish all right to the property at the last payment. Delivery to Moritz under this agreement was held a bailment, the word "furnish" implying that the property was loaned or hired with a super-added agreement to sell at a future day. The case is said to be within the principle ruled in *Rose v. Story*, *supra*, that where payment is to be for the use of a thing, with an agreement for a future sale, the contract is valid. *Rose v. Story* is several times cited as authority for this proposition, but it decides nothing of the kind. There was not the slightest agreement for the use of the property, nor was it pretended that there was. The proposition is enunciated gratuitously in the syllabus, but the decision rested, as shown above, on the ground that the vendee was in the employ of the vendor. This is recognised as the "pivot" of the case in *Ewver v. Van Geisen*, 6 Weekly Notes Cases 364.

The two recent cases referred to at the beginning of this note show a strong disposition to extend the doctrine of *Martin v. Mathiot*; *Stadfeldt v. Huntsman* closely resembled *Rowe v. Sharp* and *Enlow v. Klein*. The difference was verbal—in the "label." In *Rowe v. Sharp* there had been a nominal lease. In *Enlow v. Klein*, a lease by implication. In *Stadfeldt v. Huntsman*, the contract was practically the same, but expressed simply as an agreement to pay in instalments, with a right in the vendor to take away the goods upon default. The case is distinguished from *Rowe v. Shar*, because there was no lease in terms, nor was

anything said as to re-delivery. Nothing was said as to re-delivery in *Enlow v. Klein*, but there was an implied lease. Here there was none. *Brunswick v. Hoover* is even more on all fours with *Rowe v. Sharp*. The draftsman of the contract, probably having the latter case in mind, made the agreement in the form of a sale in instalments, to be secured by lease. Subsequently, a lease was executed by vendors to vendees, without, however, containing in terms an agreement to re-deliver. This arrangement the court pronounced truly a "thin disguise," "too clumsy to have the merit of being clever," and held the transaction a sale, concluding their opinion by saying: "There is not the slightest element of bailment in the transaction. It is immaterial what the parties call it, the law pays little attention to the label; it looks beneath and examines the nature of the contract between the parties." It must be confessed that this language is hard to reconcile with *Rowe v. Sharp* and *Enlow v. Klein*. No one can suppose for a moment that an actual re-delivery of the tables was contemplated in *Rowe v. Sharp*, especially in view of the evidence of a sale prior to the lease. It was the "label" and only the label at which the court looked in that case. And the true difference between it and *Brunswick v. Hoover*, is that the agreement was cleverly drawn in the one case and clumsily in the other. The disguise is equally evident in both. There was no agreement whatever for a re-delivery in *Enlow v. Klein*, and though the facts of that case are not so nearly in point as in *Rowe v. Sharp*, both cases show a tendency toward forsaking the doctrine of *Martin v. Mathiot*—a tendency directly the reverse of *Stadfeldt v. Huntsman* and *Brunswick v. Hoover*. It is greatly to be regretted that *Martin v. Mathio* should be returned to in the face of the requirements of modern convenience, and when Judge TILGHMAN'S assertion

in that case that such agreements "are not in the usual course of business," is certainly no longer true, if it ever was.

I have reviewed at length the Pennsylvania law, in order to show the fallacy of the rule lately returned to, so strongly evidenced by the constant exceptions to the rule made from time to time, and the final gradual tendency to relinquish it altogether, until it was restored by the two last cases. The following are interesting cases in Pennsylvania: *Chamberlain v. Smith*, 44 Penn. St. 431; *Becker v. Smith*, 59 Id. 469; *Henry v. Patterson*, 57 Id. 346; *Haak v. Linderman*, 64 Id. 501; *Stiles v. Whitaker*, 1 Phila. 271; *Farrell v. Nathans*, Id. 557; *Henkels v. Brown*, 4 Id. 299; *Crist v. Kleber*, 79 Penn. St. 290; *Heppe v. Speakman*, 7 Phila. 119; *Price v. McCallister*, 3 Grant's Cas. 248.

In New York, the question has arisen with great frequency, and the decisions are not all reconcilable, but the later ones are opposed to the late Pennsylvania decisions, and hold that the vendee in such cases takes no title, nor do his creditors, or *bona fide* purchasers from him, until he has paid the price, upon which, in the agreement, his acquisition of title depends: *Wait v. Green*, 36 N. Y. 556, was in accord with the rule in Pennsylvania, and was for some time followed. There was no condition in the original agreement in that case, but at the time of delivery the condition was annexed; and *Ballard v. Burgett*, 40 N. Y. 314, and *Austin v. Dye*, 46 N. Y. 500, are distinguished by Judge RAFFALO in *Comer v. Cunningham*, 77 N. Y. 391, on the ground that where the original contract is absolute and the delivery conditional, the doctrine of *Wait v. Green* would apply, but where the original contract is conditional, the rule would be different. But this distinction can hardly be maintained: *Smith v. Lynes*, 1 Seld. 41. And *Wait v. Green* may now be considered not law, as the judge who delivered the

opinion in the case, says, in a note to the reporter in 20 How. Fr. 530, that "the heresy of that case should not be perpetuated"—he and his colleagues being now convinced that their decision had been erroneous. The vendee must not, however, be empowered by the contract to do anything inconsistent with his imperfect title. If, therefore, the contract contains a provision that the vendee may resell the goods, a purchaser from him will be protected, though the price be not paid the original vendor: *Fitzgerald v. Fuller*, 19 Hun 180; *Ludden v. Hazen*, 31 Barb. 650; *Cole v. Munn*, 3 T. & C. 380. The cases of *Moss v. Boon*, 70 N. Y. 465; *Comer v. Cunningham*, 77 Id. 391; *Ballard v. Burgett*, 40 Id. 314; *Austin v. Dye*, 46 Id. 500, may be considered as settling the law in New York and establishing the validity of such contracts even as to *bona fide* purchasers and creditors.

In New Jersey, the law coincides with that of New York, although the question does not seem to have arisen until recently, and I have been able to find but one case on the point: *Cole v. Berry*, 13 Vroom 308. The authorities are cited, and the Pennsylvania doctrine noticed and pronounced against the weight of authority, in an able opinion by DEPUÉ, J.

The Delaware reports contain no adjudication upon the question.

Of the New England states, in Maine the courts go pretty far in opposition to the Pennsylvania doctrine. The validity of such contracts as against *bona fide* purchasers and creditors is beyond question established: *Sawyer v. Shaw*, 9 Me. 47; *Whipple v. Gilpatrick*, 19 Me. 427; *Tibbets v. Towle*, 12 Id. 341; *Porter v. Foster*, 20 Id. 391; *Leighton v. Stevens*, 22 Id. 252; *Hotchkiss v. Hunt*, 49 Id. 213; *Rawson v. Tuel*, 47 Id. 506; *Sawyer v. Fisher*, 32 Id. 28; *Brown v. Haynes*, 52 Id. 578; *Everett v. Hall*, 67 Id. 497; *Rogers v. Whitehouse*, 71 Id. 222. So different is the view taken

by the court of Maine from that of Pennsylvania, that an agreement that goods shall be returned or paid for on a day certain, with or without a provision that in case of their return, rent shall be paid for them, will pass the title in Maine, and will not in Pennsylvania: *Dearborn v. Turner*, 16 Me. 17; *Buswell v. Bicknell*, 17 Id. 344; *Perkins v. Douglass*, 20 Id. 317. And so firmly established is the principle, that a man may annex what conditions he chooses to the sale of his property, that in a case where A. negotiated with B. for the sale of goods, and C. at A.'s request paid for them on the condition that he was to be owner until repaid, and the goods were delivered to A. and C. jointly, a *bona fide* purchaser from A. was not protected as against C., even though B. supposed that he was selling the goods to A.: *Tainter v. Lombard*, 53 Me. 369. And where property is sold to remain the vendor's until wholly paid for, if the vendee sell the property after partial payment, the purchaser is not entitled to deduct this payment in an action of trover by the original vendor. The contract and delivery give the vendee no right to sell the property until the condition is absolutely performed: *Brown v. Haynes*, *supra*. The condition is not illegal or void, even though the vendee be given a right to sell the goods. While the vendor, under such circumstances, cannot recover from purchasers to whom the goods have been properly sold, he can from the vendee or his assignee for the benefit of creditors: *Rogers v. Whitehouse*, *supra*. But strong as is the tendency of the Maine cases toward protecting the vendor in conditional sales, when it can be shown that the sale has once been complete by the performance of the condition, no acknowledgment by the vendee that the property is still the vendor's will avail against *bona fide* purchasers or creditors: *George v. Shubbs*, 26 Me. 243.

In New Hampshire the same rule prevails, and such contracts are valid: *Fisk v. Ewen*, 46 N. H. 173; *Kimball v. Jackman*, 42 Id. 242; *Dudley v. Sawyer*, 41 Id. 326. And in that state, where nothing is said as to payment and delivery, there is an implied condition that the price shall be paid before the property shall vest, simple delivery not being conclusive evidence of the waiver of the condition: *Ferguson v. Clifford*, 37 N. H. 87. If the contract be that the vendee shall pay for the article or for its use, and before the day fixed he sells his interest to a purchaser with notice, the latter may tender the original vendor the price and acquire the property. But the property does not pass to the original vendee so as to enable him to confer title on a subsequent purchaser. His interest is equitable merely: *Sargent v. Gile*, 8 N. H. 325; *Bailey v. Colby*, 34 Id. 29; *Esty v. Graham*, 46 Id. 169. If the property has become part of land, as rails on a railroad, subsequent purchasers and mortgagees of the land will be protected; *Haven v. Emery*, 33 N. H. 66.

The Vermont cases establish the same general rule. In that state, until 1854, when the law was so far altered by statute, an attaching creditor of the vendee, or a purchaser from him, could not, even by a tender of the price and interest, defeat the vendor's right to maintain trover: *Bigelow v. Huntley*, 8 Vt. 151; *Bradley v. Arnold*, 16 Id. 382; *Smith v. Foster*, 18 Id. 183; *Buckmaster v. Smith*, 22 Id. 203; *Martin v. Eames*, 26 Id. 476; *Child v. Allen*, 33 Id. 476; *Hurd v. Fleming*, 34 Id. 169; *Burnell v. Marvin*, 44 Id. 277; *Duncan v. Stone*, 45 Id. 118. Where, however, the recovery of the vendor would really enure to the benefit of the vendee, the rule does not apply. A distinction is taken between conditional sales, by their terms permitting the conditional vendees to resell the goods, and those simply permitting him to consume them. The former are not good against

purchasers without notice—the latter are: *Armington v. Houston*, 38 Vt. 448.

The same general rule obtains in Rhode Island: *Goodell v. Fairbrother*, 12 R. I. 233.

In Massachusetts there have been some interesting applications of the rule. It was held in *Fairbank v. Phelps*, 22 Pick. 535, that where the condition remained unbroken, the vendor could not maintain trover without previous demand for the price or the goods, as his right of possession was wanting. But the validity of such contracts is well established, and it has not been necessary that the condition should be very clearly expressed, at least as against the vendee's creditors: *Hill v. Freeman*, 3 Cush. 257; *Heischorn v. Carney*, 98 Mass. 149; *Armour v. Pecker*, 123 Id. 143. And the distinction hinted at in *Hill v. Freeman*, between creditors and *bona fide* purchasers, has been done away with in the case of *Coggill v. Railroad Co.*, 3 Gray 545, a leading case on the subject in Massachusetts, and, indeed, elsewhere, as it is frequently and approvingly cited in other states. It does not affect the case that the seller knew the buyer to be a dealer in the kind of goods sold, nor will an understanding that the goods are to be placed in the vendee's shop for sale enable a purchaser of the *whole stock* to hold it against the original vendor: *Sargent v. Metcalf*, 5 Gray 306; *Burbank v. Crooker*, 7 Id. 158. In general, see cases already cited, and *Gilbert v. Thompson*, 3 Gray 550, note; *Blanchard v. Child*, 7 Id. 155; *Deshon v. Bigelow*, 8 Id. 159; *Zuchtmann v. Roberts*, 109 Mass. 53; *Benner v. Puffer*, 114 Id. 376. It is no defence to an action of replevin by the seller, that the defendant lent the original vendee part of the money paid, and afterwards tendered the remainder of the agreed price to the seller: *Chase v. Pike*, 125 Mass. 117. But if the vendee sells the property before all the money is paid, and after-

wards tenders the rest of the money, this will confirm the title of the purchaser from him: *Day v. Bassett*, 102 Mass. 445; *Currier v. Knapp*, 117 Id. 324. And a conditional vendee, even after condition broken, may maintain trover for the goods against a person becoming wrongfully possessed of them: *Harrington v. King*, 121 Mass. 269.

Such contracts have met with the same construction in Connecticut, a fact which is not a little remarkable in a state where the doctrine of fraudulent possession is so strongly adhered to: *Forbes v. Marsh*, 15 Conn. 384; *Hart v. Carpenter*, 24 Id. 427. They are looked upon as agreements for a future sale, or as bailments: *Tomlinson v. Roberts*, 25 Conn. 478; *Hughes v. Kelly*, 40 Id. 148; *Brown v. Fitch*, 43 Id. 512. And in the principal case the court has followed the Massachusetts cases, in holding that the giving of authority to the vendee to dispose of the goods before payment will not necessarily invalidate the condition.

In the South and Southwest, the adjudications upon the point are not numerous. In many of the states, statutes have been passed within the last few years requiring contracts of the kind to be filed and recorded. No cases appear in Virginia, West Virginia, Florida and Texas. In the two Virginias, a statute was passed in 1873 of the kind just mentioned, and in Texas a similar statute was passed in 1879. A dictum in accord with the Pennsylvania rule appears in *Carroll v. Wiggins*, 30 Ark. 402, and in *Butler v. Gannon*, 53 Md. 333. The law in Kentucky corresponds with that in Pennsylvania, and the same doctrine was adopted by the Supreme Court of Alabama in *Sumner v. Woods*, 52 Ala. 94; *Dudley v. Abner*, Id. 572; *Leigh v. Railroad*, 58 Id. 165, but the contrary doctrine has been recently enunciated in *Fairbanks v. Eureka Co.*, 2 South. L. J. (N. S.) 465; see, also, *Holman v. Lock* 51 Ala. 287. North

and South Carolina, Georgia, Mississippi and Tennessee recognise the validity of conditional sales, as to all parties. In South Carolina, the condition is void if verbal, by Act of 1843: *Talmadge v. Oliver*, 14 S. C. 524, and cases cited. In *Woods v. Burrough*, 2 Head 207, a distinction is taken between the reservation of lien and the reservation of ownership. The former is invalid, unless done under certain forms. The latter is perfectly valid. This case affords an admirable illustration of the fact that *lien* and *ownership* or *property* are distinct. Lien is too often regarded as a remnant of the right of property—such is not the case, and the distinction is of great importance. It forms the fundamental difference between cases where the vendee has and has not the title. If lien only is reserved, the ownership is gone from the vendor to the vendee by the very terms of the agreement, and the result is, of course, entirely different. The accidental loss of the thing sold must be borne by the conditional vendee: *Bank v. Vandyck*, 4 Heisk. 617. This point is, however, left undecided in Georgia: *Bentley v. Johnson*, 63 Ga. 661. In Georgia, resale by a conditional vendee is a conversion, and the vendor may sue in trover at once, although the time for payment has not yet arrived: *Sims v. James*, 62 Ga. 260. See, generally, *Ballew v. Sudderth*, 10 Ired. 176; *Purris v. Roberts*, 12 Id. 268; *Ellison v. Jones*, 4 Id. 48; *Smith v. Sasser*, 5 Jones 388; *Talmadge v. Oliver*, 14 S. C. 524; *Houston v. Dyche*, Meigs 76; *Gambling v. Read*, Id. 281; *Price v. Jones*, 3 Head. 84; *Holmark v. Molin*, 5 Cold. 482; *Bradshaw v. Thomas*, 7 Yerg. 497; *Ketchum v. Brennan*, 53 Miss. 596; *Vaughn v. Hapson*, 10 Bush 338; expressly overruling *Patten v. McCane*, 15 B. Mon. 558; *Greer v. Church*, 13 Bush 430; *Goodwin v. May*, 23 Ga. 205; *Flanders v. Huguenin*, 58 Ga. 56.

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The law of Ohio is opposed to the Pennsylvania doctrine: *Carmack v. Gordon*, 2 Cin. S. C. R. 408.

So in Indiana: *Hanway v. Wallace*, 18 Ind. 377; *Dunbar v. Rawle*, 28 Id. 225; *Bradshaw v. Warner*, 54 Id. 58; *Thomas v. Winters*, 12 Id. 322; *Hodson v. Warner*, 60 Id. 214; *McGin v. Sell*, 60 Id. 249. In *King v. Wilkins*, 11 Ind. 349, it was said that the vendor could not set up his title as against a creditor who had trusted the vendee on the faith of the goods. But this is disapproved in *Bradshaw v. Warner*, *supra*. Mere endorsement of a note for the payment of the price, containing a stipulation that the article is to remain the vendor's until full payment, will not vest the property in the endorsee so as to enable him to maintain replevin against the vendee. It is doubtful whether the vendor's reservation of property is assignable: *Domestic S. M. Co. v. Arthurhultz*, 63 Ind. 322.

The Pennsylvania doctrine obtains in Illinois: *Ketchum v. Watson*, 24 Ill. 592; *McCormick v. Hadden*, 37 Id. 370; *Murch v. Wright*, 46 Id. 487. And the case of *Lucas v. Campbell*, 88 Id. 447, would seem to go further and to suggest that as between the parties, the property is in the vendee (see pages 450, 451), but the question in the case was as to the vendee's attaching creditor. This case is an example of the prevalent manner of drawing contracts for the sale of sewing machines on the instalment plan; such a contract is held to be a sale in Illinois: *Latham v. Sumner*, 89 Ill. 234. In *Young v. Bradley*, 68 Id. 557, it is broadly stated that the law of Illinois is, that a delivery of personalty under a contract of sale by an unpaid vendor to a vendee passes the title, as to innocent purchasers, irrespective of the particular terms of the contract or the intention of the parties: *Jennings v. Gage*, 13 Ill. 610; and *Brundage v. Camp*, 21 Id. 330, are leading authorities for this proposition. A careful

perusal of them, particularly the earlier one, will show that, as applied to these facts, they hardly go so far. Subsequent cases, however, clearly establish the law as above stated: *Sibley v. Tye*, 88 Ill. 287; *M. C. Railroad Co. v. Phillips*, 60 Id. 190.

The opposite rule prevails in Michigan: *Couse v. Tregent*, 11 Mich. 65; *Dunlap v. Gleason*, 16 Id. 158; *Whitney v. McConnell*, 29 Id. 14.

In Wisconsin, the Act of 1873 makes all agreements of the kind void as to creditors, unless properly filed and recorded. It is doubted in *Kimball v. Post*, 44 Wis. 471, whether if the agreement takes the form of a lease it is within the statute, but the court incline strongly to the opinion that it is.

A like statute was passed the same year in Minnesota. The case most nearly in point is *McClelland v. Nichols*, 24 Minn. 176.

In Iowa the validity of these contracts was recognised by the courts, although originally with one dissent out of three judges: *Bailey v. Harris*, 8 Iowa 331; *Robinson v. Chapline*, 9 Id. 91; *Baker v. Hall*, 15 Id. 277; *Knulton v. Redenbaugh*, 40 Id. 114; *Mosely v. Shattuck*, 43 Id. 540. By Act of 1872, Code, sect. 1922, sales of this kind must be in writing and recorded to avail against creditors and purchasers, and the recording must be with due promptness: *Push v. Weston*, 52 Iowa 675. The act is not retrospective: *Knowlton v. Redenbaugh*, *Mosely v. Shattuck*, *supra*.

There have been one or two remarkable rulings in Missouri recently. The cases of *Farmlee v. Catherwood*, 36 Mo. 479; *Griffin v. Fugh*, 44 Id. 326; *Little v. Page*, Id. 412; *Ridgway v. Kennedy*, 52 Id. 24, settled the law of that state in opposition to the Pennsylvania doctrine. In 1877 the legislature passed an act avoiding such sales as to third persons unless recorded, etc. (Sect. 2507, R. S.) Since then, *Rob-*

bins v. Phillips, 68 Mo. 100; *Wangler v. Franklin*, 70 Id. 659; *Sumner v. Cottey*, 71 Id. 121; *Dwyer v. Denny*, 6 Mo. App. 578; *Willard v. Sumner*, 7 Id. 577, have been decided, and the doctrine of *Farmlee v. Catherwood* distinctly reiterated. The cases of *Robbins v. Phillips* and *Sumner v. Cottey* arose before the passage of the act. It is not stated when the facts of the other cases occurred; but the rule is reiterated in the strongest way, record is pronounced unnecessary, and the Act of 1877 not even alluded to. The only statutory enactment mentioned is sect. 5, p. 280, 1 Wag. Stat. (1870), which was less express, and held not to apply. There is doubtless some reason for this apparent direct conflict, but it is perplexing, at least, to the outside reader.

These contracts are valid in Kansas: *Hall v. Draper*, 20 Kans. 137.

An act passed in 1877 in Nebraska requires conditional sales to be recorded, etc.; prior to that time they were held valid: *Aultman v. Mallory*, 5 Neb. 180. They are valid in California, Oregon and Nevada: *Kohler v. Hayes*, 41 Cal. 455; *Singer Manuf. Co. v. Graham*, 8 Oregon 17; *Cardinal v. Edwards*, 5 Nevada 36. The question has not been before the courts of Colorado.

Two recent decisions in point appear in the United States Supreme Court Reports: *Hervey v. Locomotive Works*, 3 Otto 664, where the case arose in Illinois, and in conformity with the law of that state, as shown above, the contract was held invalid as to third persons without notice, and *Heryford v. Davis*, 12 Otto 235, a case which arose in Missouri, and in which the contract was held invalid as not having been recorded under the chattel mortgage acts of that state. The facts occurred before 1877, so that the statute of that date would not apply; but counsel, *arguendo*, asserted that the law "was, and now is," that such contracts are per-

fectly valid in Missouri. Justice BRADLEY dissents strongly, and advocates the liberal construction of contracts of this nature, and his views are certainly borne out by the increasing number of conditional sales in various forms, of which the "instalment plan" of selling sewing machines, and "car trusts," are examples. Such contracts bid fair to become quite as much in the usual course of business as the long-recognised con-

tracts of hiring, bailments for storage, etc. And no reason can be shown why the possession is more or less deceptive in the one case than in the other. The great weight of authority, as we have seen, is against the last two Pennsylvania cases, and it is to be hoped that the Supreme Court of that state will not long continue to occupy its present nearly unique position.

LUCIUS S. LANDRETH.

United States Circuit Court, District of Minnesota.

SONSTIBY v. KEELEY.

In cases of conflict between the decisions of the federal courts and those of the state courts, the former will, even on questions of commercial law, follow the decisions of the state courts if it appears that, by reason of the situation of the parties and of the subject-matter, a contrary ruling would subject a party to a double payment of the same debt, without the possibility of relief from the federal courts.

In a suit in a federal court, a sale made in Minnesota was attacked on the ground of the vendor's fraud, and it appeared that part of the consideration was an agreement by the vendee to assume the payment of a debt of the vendor to a third person, which agreement would, under the rulings of the Minnesota courts, render the vendee liable to such third person therefor. *Held*, that the federal court would treat the assumption of such debt as a valid consideration.

Whether, in an action at law involving the validity of a sale, the court can apply the equitable principle that an innocent vendee who, subsequent to the sale, has received notice of the vendor's fraud will be protected only to the extent of the portion of the consideration paid prior to the receipt of such notice: *Quære*.

MOTION for a new trial.

This was an action at law arising out of a sale of certain property by one Forbes to the plaintiff, and its subsequent seizure as the property of Forbes under attachment proceedings. It appeared that, prior to September 1878, Forbes was the owner of a stock of dry goods in a store at Waseca, Minnesota. On the 17th of that month he executed a bill of sale of said stock of goods to the plaintiff, and delivered to him possession. This was done by virtue of an agreement of sale, made without any fraudulent intent on the part of plaintiff, and without any knowledge by him of any such intent on the part of Forbes, by which agreement plaintiff paid Forbes for the goods \$3000 in cash, and assumed the payment of certain debts held by a bank in Waseca against Forbes, amounting to about \$3800. This agreement was made, or at least

repeated, in the presence of the cashier of the bank, to whom a list of the debts was exhibited, with the statement that plaintiff had agreed to pay them. There was no proof of any agreement of the bank to look to plaintiff or to release Forbes, except the proof that the cashier was advised of and assented to the arrangement. Subsequently to the delivery of possession to plaintiff, the sheriff, by virtue of certain writs of attachment against Forbes, levied upon and took possession of the goods as the property of Forbes, under the claim that the sale to plaintiff was void because made to hinder, delay and defraud creditors. One of the questions raised in the present case was, whether if there was fraud on the part of Forbes, the assumption of the bank debts by plaintiff was binding upon him, and therefore equivalent to a cash payment, or whether it did not bind him, and therefore he was to be protected only to the extent of the actual cash paid? The court charged that the agreement to assume the debts rendered plaintiff liable to the bank, and therefore was equivalent to the payment of so much money. This ruling was the ground for the motion for a new trial.

Wilson & Gale and Rogers & Rogers, for the motion.

C. K. Davis, *contra*.

The opinion of the court was delivered by

MCCRARY, C. J.—I have grave doubts as to the propriety of attempting to apply to a case at law the principle invoked by counsel for defendant in this case. That principle is, that where a vendee buys in good faith, and without notice of fraud on the part of the vendor, and pays a part only of the consideration, agreeing to pay the remainder at a future day, if, before such remainder is paid, he receives notice of the vendor's fraud, he will be protected only to the amount actually paid before notice. No doubt this is sound principle in equity; but can it be applied by a court of law? Can such a court rescind the contract *pro tanto*, and place the parties *in statu quo*? If so, can it be done in a case like the present, in which no issue is made except upon the validity of the sale? If the sale was held void, so as to leave the title in Forbes, against whom the attachments were issued, judgment at law could be rendered for defendant; but where the sale

is found to be valid and *bona fide*, so far as the vendee is concerned, and the title is vested in him, and where he has sold or disposed of a portion of the stock, and probably expended money and given time and labor in its care and preservation, it seems probable that only a court of equity would be competent to grant any relief to the creditors of the vendor.

But it is not necessary to pass finally upon this question, as I am clearly of the opinion that the proof shows a payment by plaintiff of the whole of the purchase price. It is contended that the promise by plaintiff to assume and pay the indebtedness of Forbes at the bank, though made as a part of the consideration for the purchase, was not payment, and this for the reason that plaintiff is not legally bound to pay those debts. It is said that the holders of those claims cannot sue plaintiff and recover upon them. Upon this question there is a conflict of authority in this country. In many of the states the right of action by the payee of such debts against the party assuming to pay them is maintained, even where such payee is not party to the contract.

This is upon the ground that such a promise is an original promise, based upon a valuable consideration, namely, the sale and delivery of the goods: 1 Pars. Cont. (5th ed.) 466-468; *Fanley v. Cleveland*, 4 Cow. 432; *Same v. Same*, Id. 639; *Canal Co. v. Bank*, 4 Duer 97; *Lawrence v. Fox*, 20 N. Y. 268; *Arnold v. Lyman*, 17 Mass. 400; *Carnegie v. Morrison*, 2 Met. 404; *Crocker v. Stone*, 7 Cush. 338; *Hynd v. Holdship*, 2 Watts 104; *Burs v. Robinson*, 9 Barr 229; *Eddy v. Roberts*, 17 Ill. 508; *Todd v. Tobey*, 29 Me. 219; *Motley v. Manufacturing Ins. Co.*, Id. 337; Metcalf on Cont. 205-11, and cases cited in notes.

And such is the law in Minnesota, as repeatedly decided by the Supreme Court of that state: *Sanders v. Clason*, 18 Minn. 379; *Goetz v. Foos*, 14 Id. 265; *Merriam v. Lumber Co.*, 23 Id. 314. But the opposite doctrine is maintained by numerous cases, and among them, by the Supreme Court of the United States, in *Nat. Bank v. Grand Lodge*, 98 U. S. 123; 2 Chitty Cont. (11th ed.) 74, and cases cited in notes; *Mellon v. Whipple*, 1 Gray 317.

Ordinarily, this court would feel bound to adopt and follow the rule laid down by the Supreme Court in *National Bank v. Grand Lodge*, *supra*; but, under the peculiar circumstances of the present case, I am clearly of the opinion that I ought to apply the rule established by the Supreme Court of the state of Minnesota.

It will be observed that the plaintiff assumed and agreed, in consideration of the sale to him of the stock of goods, &c., to pay certain debts held by the bank against Forbes. In so far as the debts are the property of the bank, it is certain that they can be sued upon only in the state courts; for it appears that the bank is a corporation of the state of Minnesota, and the plaintiff a citizen of that state. How many of these debts belong to the bank, and how many to other parties represented by the bank, and how many of such other parties are citizens of Minnesota, does not appear, nor is it material; it is enough to say that certainly a part, and probably the whole, of said debts could only be collected by suit in the state courts. It may be that some of the claims are less than \$500, and for that reason not within the jurisdiction of this court. I must assume, therefore, that, in case plaintiff refuses to pay said claims, suits must be brought certainly upon some of them, and probably upon all of them, in the courts of Minnesota.

So far as those courts are concerned, as already seen, the law is settled by repeated decisions of the Supreme Court, and, in accordance therewith, the plaintiff would be held liable in a suit by the payee of any of said debts. The question, therefore, is, shall this court hold that the creditors of Forbes are entitled to recover from plaintiff the sum of those debts, in this case, and thus subject him to a second payment of the same amount to the holders of the claims?

A decision which would establish such injustice as this is not, I am sure, required at my hands. It is true that this case does not belong to the class in which, as a rule, the federal courts are required to follow the decisions of the highest judicial tribunal of the state. But, although the question is a new one, I am clearly of the opinion that, even on questions purely of commercial law, the federal courts should follow those decisions if it appears that, by reason of the situation of the parties and of the subject-matter, to hold otherwise would subject a party to double payment of the same debt, without the possibility of relief from the federal courts. The motion for a new trial is overruled.

It is proposed to indicate the extent and limitations of the rule, that "The laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require

or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Jud. Act 1784, sect. 34 (Rev. Stat. U. S., sect. 721).

I. Exceptions.

UNITED STATES CONSTITUTION, STATUTES AND TREATIES.—The laws of the several states are not rules of decision for the federal courts in cases where the Constitution, treaties or statutes of the United States otherwise require or provide. See *Denn v. Harnden*, 1 Paine 55.

SPECIAL CASE.—A case gotten up in a state court for the purpose of anticipating a decision by the Supreme Court of the United States, on a question known to be pending before it, would not necessarily be followed. This is intimated *obiter* in *Pease v. Peck*, 18 How. 595. But *East Oakland v. Skinner*, 94 U. S. 255, holds that the Supreme Court of the United States, when shown a decision of a state Supreme Court construing a state statute, will not entertain the objection that the cause in which it was rendered was a fictitious one, and decline to follow the decision as not genuinely contested.

PRIVATE ACTS.—In *Smith v. Kernochan*, 7 How. 198, a case in which the Supreme Court of Alabama had construed the charter of an insurance company, holding it violated by a transaction leading to a mortgage, it was held that such construction of the charter by the state court would be followed; but, subsequently, in *Williamson v. Berry*, 8 How. 495, it was held that the Supreme Court of the United States would not be bound by a state court's construction of a private act, the act in this case being one for the discharge and appointment of a trustee in a certain case.

CRIMINAL LAWS.—Nor are the criminal laws of a state to be followed by the federal courts: *United States v. Reid*, 12 How. 361.

ADMIRALTY.—State laws are not of binding force in cases in admiralty: *Neves v. Scott*, 13 How. 268. But in *The Princess Alexandra*, 8 Ben. 209, it was held that the construction put by the

highest court of a state upon a pilot law is binding upon the federal courts—and this, notwithstanding a different construction had been previously put upon the law by the United States Supreme Court.

EQUITY.—Nor in equity: *Russell v. Southard*, 12 How. 139; *Neves v. Scott*, 13 Id. 268. But see *Ewing v. St. Louis*, 5 Wall. 413, where it was held that a non-resident complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts, and that, if in the latter courts equity would afford no relief, neither will it in the former.

PLEADINGS AND PRACTICE.—State rules relating to pleadings and procedure are not within the meaning of the 34th section, although by another enactment: Sect. 914, Rev. Stat. U. S. (Act June 1st 1872, sect. 5), they are made rules for the guidance of the Circuit and District courts of the United States within the several states. See *Robinson v. Campbell*, 3 Wheat. 212; *Fenn v. Holme*, 21 How. 481; *Sheirburn v. Cordova*, 24 Id. 423; *Wayman v. Southard*, 10 Wheat. 1; *Brown v. Van Braam*, 3 Dall. 351; *Atlantic, &c., Railroad Co. v. Hopkins*, 94 U. S. 11; *Chemung, &c., Co. v. Lowery*, 93 Id. 72.

GENERAL JURISPRUDENCE.—(a.) *Commercial law.*—The federal courts refuse to be bound by decisions of the state tribunals in cases involving questions of general jurisprudence, and especially in cases involving questions of commercial law. Thus, in *Williams v. Suffolk Ins. Co.*, 3 Sumn. 270, 277, concerning the rule *causa proxima non remota spectatur*, STORY, J., held that "this doctrine being founded not upon local law, but upon the general principles of commercial law, would be obligatory upon this court, even if the decisions of the state court of Massachusetts were to the contrary; for upon commercial questions of a general nature the courts of the United States possess the same

general authority which belongs to the state tribunals, and are not bound by the local decisions. They are at liberty to consult their own opinions, guided indeed by the greatest deference for the acknowledged learning and ability of the state tribunals, but still exercising their own judgment as to the reasons on which those judgments are founded." And see *Foxcroft v. Mallette*, 4 How. 353, 379.

In *Swift v. Tyson*, 16 Pet. 1, it was decided that, admitting that by the law of New York a pre-existing debt was not a valuable consideration for the transfer of an accepted bill, this rule was not obligatory upon the federal court, which therefore held that a pre-existing debt did constitute a valuable consideration in the sense of the rule protecting *bona fide* holders for value and without notice.

The same principle was recognised in *Carpenter v. The Providence, &c., Ins. Co.*, 16 Pet. 495, 511, Mr. Justice STORY holding that "we have not thought it necessary upon this occasion to go into an examination of the cases cited from the New York and Massachusetts reports, either upon this last point or upon the former point. The decisions in those cases are certainly open to some of the grave doubts and difficulties suggested at the bar as to their true bearing and results. The circumstances, however, attending them are distinguishable from those of the case now before us, and they certainly cannot be admitted to govern it. The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the con-

trary, we are bound to interpret this instrument according to our own opinions of its true intents and objects, aided by all the lights which can be obtained from all external sources whatsoever, and if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment."

In *Boyce v. Tabb*, 18 Wall. 546, slaves were held sufficient consideration for a note, notwithstanding the Supreme Court of Louisiana had held otherwise. And see *Brown v. Van Braam*, 3 Dall. 354; *Robinson v. Ins. Co.*, 3 Sumn. 220; *Gloucester Ins. Co. v. Younger*, 2 Curtis 322.

The opinion of Judge McCrary in the principal case admits the rule to be that the federal will not necessarily follow the state courts in deciding questions of commercial law, but excepts the principal case from the operation of the rule on the ground that to do otherwise might subject the plaintiff to a double liability. This certainly appears equitable; for were the plaintiff sued by the bank in the state court, a plea of former recovery could not protect him, since the bank was not a party to the suit in the federal court, and therefore could not be concluded by its action. Had the bank been a party and then sought to subject the plaintiff to a second liability, it would seem that a plea of former recovery would avail the latter, or that he might have procured an injunction from the federal court restraining the bank from proceeding at the state court. See *French v. Hay*, 22 Wall. 250; *Fisk v. U. P. Railroad Co.*, 10 Blatchf. 518.

Federal courts will not follow decisions of state courts where so to do would impair the obligation of contracts: *Gilpeke v. Dubuque*, 1 Wall. 175. In this case, by a series of decisions of the Supreme Court of Iowa prior to that of *Iowa v. Wapello*, 13 Iowa 388, the right of the legislature

of that state to authorize municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly, was settled in favor of the right; and it was held that those decisions meeting with the approbation of this (the federal supreme) court, and being in harmony with the adjudications of sixteen states of the Union, will be regarded as a true interpretation of the Constitution and laws of the state so far as relate to bonds issued and put upon the market during the time that those decisions were in force. "The fact," said the court, "that the Supreme Court of Iowa now hold that those decisions were erroneous, and ought not to have been made, and that the legislature of the state had no such power as former courts decided that they had, can have no effect upon transactions in the past, however it may affect those in the future." And to the same effect, see *Havemeyer v. Iowa County*, 3 Wall. 294; *Kenosha v. Lamson*, 9 Id. 477; *Alcott v. Supervisors*, 16 Id. 678; *Mitchell v. Burlington*, 4 Id. 270; *Larned v. Burlington*, Id. 275; *Delmas v. Ins. Co.*, 14 Id. 661. But see *Stone v. Wisconsin*, 94 U. S. 181.

And the U. S. Supreme Court affirms its right to construe a state statute independently of the state courts when such statute in fact amounts to a contract: *Jefferson Branch Bank v. Skelly*, 1 Blk. 436; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 145.

And where a question involved in the construction of state statutes practically affects the remedies of creditors which are protected by the Constitution, this court will exercise its own judgment on the meaning of the statutes, irrespectively of the decisions of the state courts, and if it deems those decisions wrong, will not follow them. A remedy which the statutes of a state on what this court considers a plainly right construction of them, give for the enforcement of contracts, cannot be taken away,

as respects previously existing contracts, by judicial decisions of the state courts construing the statutes wrongly: *Butz v. Muscatine*, 8 Wall. 575.

(b.) *Other Cases.*—And in cases of general jurisprudence other than those involving questions of commercial law, the decisions of the state courts will not necessarily be followed.

Thus, in *Chicago v. Robbins*, 2 Black 418, the city of Chicago sought to recover from Robbins indemnity for damages recovered against it because of an injury to one who had fallen into a hole negligently left open and unguarded by Robbins. The Supreme Court of Illinois had previously decided a case similar to *Chicago v. Robbins*, laying down a rule as to negligence in omitting to cover an opening in an arca to which the federal Supreme Court disagreed. It was urged that the decision in the state court must be followed, but the court, by Mr. Justice DAVIS, held that "where private rights are to be determined by the application of common-law rules alone, this court, although entertaining for state tribunals the highest respect, does not feel bound by their decisions."

Thomas v. Hatch, 3 Sumn. 170, holds that the federal courts are not bound in the interpretation of deeds by the local adjudications of a particular state.

And where a question arises under a compact between two states, the rule of decision is not to be collected from the decisions of either state, but is one of a national character: *Marlatt v. Silk*, 11 Pet. 1.

II. Cases within the Rule.

CASES INVOLVING STATE CONSTITUTIONAL PROVISIONS.—Thus, in *South Ottawa v. Perkins*, 94 U. S. 260, the Supreme Court of the United States followed the Supreme Court of Illinois in deciding that under the Constitution of 1848 of that state, a statute thereof is not valid unless the legislative journals show its passage by a majority of all the mem-

bers-elect in each house of the General Assembly.

In *Nesmith v. Sheldon*, 7 How. 812, the same court followed the Supreme Court of Michigan in deciding that under a constitutional provision forbidding the legislature from "passing any act of incorporation unless with the assent of at least two-thirds of each house," the judgment of the legislature is required to be exercised upon the propriety of creating each particular corporation, and two-thirds of each house must sanction and approve each individual charter. And see *County of Leavenworth v. Barnes*, 94 U. S. 70.

In *Luther v. Borden*, 7 How. 1, two governments having been in existence in Rhode Island, viz.: the old charter government and a new one formed by a convention of the people, and the courts of that state having recognised the former as valid, it was held that the federal court would adopt and follow the state court's decision; and see *Webster v. Cooper*, 14 How. 504.

CASES INVOLVING STATE STATUTES.

(a.) *Miscellaneous Statutes*.—It is to be remarked that where a state adopts a statute from another country, the decisions of such other country construing such statute are entitled to great consideration, but cannot be considered as conclusive upon the construction of the law; if the doctrines of the courts of the state adopting the statute be irreconcilable with those of the courts of the former country, the state court's decisions will be followed and the others disregarded: *Bell v. Morrison*, 1 Pet. 351.

In *Nichols v. Levy*, 5 Wall. 433, where a state court—interpreting a statute of its own state, which gave such court jurisdiction to subject legal and equitable interests in real estate to the claims of creditors—decided that the statute embraced trusts like the one in question (which judgment-creditors were seeking to set aside), and that it exempted the property embraced by the

trust from the claims of creditors, the Federal Supreme Court followed that construction of the statute and sustained the trust, though it remarked that if the question had been treated by it on general principles of jurisprudence, and independently of the state decisions on the statute, the judgment would necessarily have been the other way.

In *Beauregard v. New Orleans*, 18 How. 497, it was held by the Supreme Court of the United States, that its habit had been to defer to the decisions of the judicial tribunals of the states upon questions arising out of the common law of the state (compare this with *Chicago v. Robbins*, *supra*), especially when applied to the title in land.

Therefore, where the Supreme Court of Louisiana had decided questions relating to the jurisdiction of the District Court of the First Judicial District of the state over the succession of a debtor who was enjoying a respite from the claims of his creditors for a certain time, and died before the time expired; to the mode in which jurisdiction should be exercised; to the propriety of collaterally attacking a sale made by its authority; to the point whether or not the death of the party transferred the proceedings to the Court of Probate; and the mode in which the Court of Probate should exercise its jurisdiction; the Federal Supreme Court held that it would adopt these decisions—especially where many of them concurred with its own judgments upon the same or similar points.

A state decision that the statute requires the payment of taxes in gold and silver coin, will be followed: *Lane Co. v. Oregon*, 7 Wall. 71; and see *Smith v. Hunter*, 7 How. 738.

Rules of evidence prescribed by the laws of a state, are to be followed, *e. g.* a statute allowing a party to testify in his own behalf: *Vance v. Campbell*, 1 Black 427; *Haussknecht v. Claypool*, 1 Id. 431.

(b.) *Statutes of Frauds*.—In *De Wolf v. Rabaud*, 1 Pet. 476, the courts of New York were followed in holding that under the Statute of Frauds, the consideration of the promise must appear in the writing. In *Summer v. Hicks*, 2 Black 532, the decisions of the Supreme Court of Wisconsin, that, under the statute as to fraudulent conveyances, an assignment was vitiated by a provision authorizing the assignee to dispose of the property assigned, "upon such terms and conditions as in his judgment may appear best, and most for the interest of the parties concerned."

In *United States Bank v. Daniel*, 12 Pet. 32, a decision of the Kentucky court holding that a statute of that state giving ten per cent. damages for a failure to pay a bill of exchange, applied only to foreign bills.

Beach v. Viles, 2 Pet. 675, follows the local court's construction of a statute giving a particular remedy in the nature of foreign attachment against garnishees who possess goods, effects or credits of the principal debtor.

U. S. v. Morrison, 4 Pet. 124, follows a decision of the Court of Appeals, Virginia, that, under the execution-law of that state, the right to take out an *elegit* was not suspended by suing out a *fi. fa.*

(c.) *Statutes of Limitation*.—*Bell v. Morrison*, 1 Pet. 351, follows the Supreme Court of Kentucky as to what kind of a new promise will take a debt out of the statute. *Henderson v. Griffin*, 5 Pet. 151, follows the South Carolina Supreme Court in construing two limitation acts together. And where the original manuscript of the laws for the territory of Michigan left out the saving "beyond seas" in the statute, but the published law contained this exception, and the statute, as thus published, had been acknowledged by the people, and had received a harmonious interpretation for a long series of years, it was held that the phrase "beyond seas" ought to be considered a part of the

statute: *Pease v. Peck*, 18 How. 595. And see *Shelby v. Guy*, 11 Wheat. 361; *Davie v. Briggs*, 97 U. S. 628. *Shipp v. Miller's Heirs*, 2 Wheat. 316, 325, follows the Kentucky court in construing a statute allowing infants and *femes covert* three years after removal of disabilities to complete surveys on entries of land by them, and holding that joint entries of land were within the statute if one of the joint owners be infant or a *feme covert*. *Leffingwell v. Warren*, 2 Black 603, follows the Wisconsin court in holding possession under a defective tax-deed adverse, and that, if continued for a sufficient time, it would bar ejectment. And see *McCluny v. Silliman*, 3 Pet. 270; *Ross v. Dural*, 13 Id. 45; *Webster v. Cooper*, 14 How. 488; *Green v. Lessee of Neal*, 6 Pet. 291; *Amory v. Lawrence*, 3 Cliff. 523; *Tioga Railroad Co. v. Blossburg*, 20 Wall. 137.

(d.) *Statutes concerning Lands*.—*U. S. v. Morrison*, 4 Pet. 124, follows the Virginia Court of Appeals in holding a judgment a lien upon the debtor's real estate. *MaKeen v. Delancy's Lessee*, 5 Cranch 23, 32, follows state construction holding that, under a statute requiring deeds to be acknowledged before a justice of the peace, an acknowledgment before a justice of the Supreme Court would be valid.

Bodley v. Taylor, 2 Cranch 191, 220, follows the state court in holding that a court of equity might be resorted to in order to set up an equitable against a legal title; and see *Taylor v. Brown*, 5 Cranch 255; *Massie v. Watts*, 6 Id. 164. *Thatcher v. Powell*, 6 Wheat. 119, follows the state construction of a statute regulating the sale of lands for delinquent taxes. *Elmendorf v. Taylor*, 10 Wheat. 152, follows the Kentucky court in presuming that, under a land law prescribing that surveys should be recorded within three months from the time of their being made, surveys had been recorded after three months

from their date. And a state court's construction of a will will be followed: *Jackson v. Chew*, 12 Wheat. 153; *Carroll v. Carroll's Lessee*, 16 How. 275. But this is only where such construction by a state court has been long acquiesced in, so as to become a rule of property; otherwise, the state court's construction of a will need not necessarily be followed: *Lane v. Vick*, 3 How. 464, 476. *Conway v. Taylor's Ex'r*, 1 Black 603, holds that after a citizen of Kentucky has become the grantee of a ferry franchise and his riparian rights have been, by the highest legal tribunal of the state, repeatedly held sufficient to sustain the grant, the same question is not open to decision by the federal Supreme Court, the adjudications of the state courts being a rule of property and of decision which it is bound to recognise. State decisions construing recording acts must be followed: *Townsend v. Todd*, 91 U. S. 452. State constructions of statutes of descent will also be followed: *Gardner v. Collins*, 2 Pet. 58; and of an act abolishing estates tail: *Van Rensselaer v. Kearney*, 11 How. 297; and see *U. S. v. Fox*, 94 U. S. 315; and of the phrase "tide lands" in a state statute: *Walker v. State Harbor Commissioners*, 17 Wall. 648. *Christy v. Pridgeon*, 4 Wall. 196, holds that "the Mexican colonization law of August 18th 1824, though general to the republic of Mexico, was, so far as it affected lands within the limits of Texas, after the independence of that country, a local law of the new state, as much so as if it had originated in her legislation. The interpretation, therefore, placed on it by the highest court of that state must be accepted as the true interpretation so far as it applies to titles to lands in that state, whatever may be the opinion of this court as to its original soundness. If in courts of other states carved out of the territory since acquired from Mexico a different interpretation has been adopted the courts of the United

States will follow the different ruling so far as it affects titles in those states. The interpretation within the jurisdiction of a state of a local law becomes a part of that law, as much so as if incorporated in the body of it by the legislature. If different interpretations are given in different states to a similar law, that law, in effect, becomes by the interpretations, so far as it is a rule of action for this court, a different law in the one state from what it is in the other."

It is, therefore, a rule of general jurisprudence, as well as of statute, that the federal will follow the state courts in expounding purely local laws. See all the cases *supra*, and *Williamson v. Berry*, 8 How. 495; *Rice v. Railroad Co.*, 1 Black 374; *Jeter v. Hewitt*, 22 How. 352; *Webster v. Cooper*, 14 Id. 504; *U. S. v. Garlinghouse*, 4 Ben. 205; *Lamborn v. Dickinson County Commissioners*, 97 U. S. 181; *Railroad Co. v. Gaines*, Id. 697; *Cass County v. Johnston*, 95 Id. 360; *Hall v. De Cuir*, Id. 485; *Davis v. Indiana*, 94 Id. 792; *Venice v. Murdock*, 92 Id. 494; *Nelson v. Foster*, 5 Biss. 44; *Oliver v. Omaha*, 3 Dill. 368.

Besides decisions construing a statute, state decisions as to the repeal of a statute must be followed: *Bailey v. Magwire*, 22 Wall. 215.

III. Evidence of the Laws.

Statutes are of course evidence of the laws, and any state may prescribe, by its constitution or laws, what shall be conclusive evidence of its statutes. But the question as to the existence or non-existence of a statute is a judicial one, decidable by the court alone: *South Ottawa v. Perkins*, 94 U. S. 261.

Decisions of the courts of final resort are likewise evidentiary of the law. But mere *dicta* of such courts are not: *Carroll v. Carroll's Lessee*, 16 How. 275. And the decisions must be "fixed." It is "the latest settled adjudications" that are binding: *Leffingwell v. Warren*, 2 Black 599; such as may prove but

mere "oscillations" in the course of judicial settlement will not necessarily control: *Gelpeke v. Dubuque*, 1 Wall. 175; *Shelby v. Guy*, 11 Wheat. 361; *Gardner v. Collins*, 2 Pet. 85. But see *King v. Wilson*, 1 Dill. 555.

Where the decisions of a state are inconsistent, the latest will be followed: *Green v. Lessee of Neal*, 6 Pet. 291; *Leffingwell v. Warren*, 2 Black 599; except where to follow the latest decisions would impair the obligations of a contract: *Gelpeke v. Dubuque*, *supra*.

And in *Morgan v. Curtin*, 20 How. 1, the Supreme Court of the United States held that it would not reverse a judg-

ment of the United States Circuit Court which, when rendered, followed a decision of the state court, such decision having been overruled by the state court after the United States Circuit Court had rendered its decision. The Supreme Court said that the later decision of the state could not have a retroactive effect upon the decisions of the Circuit Court, and make that erroneous which was not so when the judgment of that court was given. And see *Pease v. Peck*, 18 How. 595, 599; *Rowan v. Runnels*, 5 Id. 134.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Pennsylvania.

SEAMAN v. THE COMMONWEALTH.

Under a penal statute prohibiting worldly employment on Sunday, one whose business is carried on upon that day by his employee, under his authority, is liable to the penalty.

In such case defendant may be convicted upon evidence that his store was open on Sunday; that an employee was making sales, and that defendant himself was present in the store part of the day.

CERTIORARI to the Court of Common Pleas, No. 2, of Allegheny county.

This was an information before an alderman that John W. Seaman, on December 12th 1880, "being the Lord's day, commonly called Sunday, did then and there engage in doing and performing worldly employment or business, to wit, having open his place of business on the corner of Station street and the Pennsylvania Railroad, in the city of Pittsburgh, and then and there engaged in selling, trading and vending tobacco, cigars, candies, &c., contrary to an Act of Assembly approved April 22d 1794, and its several supplements in such case made and provided."

The Act of 1794 referred to provides that "If any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted) * * * every such person so offending shall, for every such offence, forfeit and pay four dollars." By a subsequent statute the penalty in Allegheny county was increased to twenty-five dollars.

At the hearing the testimony was as follows :

A. C. Fulton : "I know John W. Seaman, the defendant. I was in his place of business last Sunday evening. Mr. Seaman was not there. Mr. Woolslare was tending store. I bought some cigars there." Cross-examined : "I was there about fifteen minutes. Don't recollect of others buying there. Jonathan Woolslare was tending store. I did not see Mr. Seaman there."

John H. Hodel : "I know John Seaman the defendant. I was in his place of business on Sunday last. The store was open. Seen sales made there on Sunday last. At one time on Sunday I saw Mr. Seaman there. Saw others in the store. Mr. Fulton and Mr. Woolslare were there."

Upon this testimony the alderman found that defendant was guilty of doing and performing worldly employment or business on Sunday, and imposed the fine prescribed by the statute. Defendant removed the case by *certiorari* to the Court of Common Pleas, which affirmed the judgment. WHITE, J., who delivered the opinion, saying; *inter alia* : "In this case the evidence was that he (defendant) was present in the store on this Sabbath. It is incredible that the clerk was selling on this day without his knowledge and authority; he was there present when the store was open to the public, thus carrying on his worldly business. * * * It is very clear he was there carrying on his business, knowing he was violating the law. The evidence was amply sufficient to prove that he was carrying on a worldly business, prohibited by the law."

Defendant removed the case by *certiorari* to the Supreme Court.

I. P. Hays (*J. S. Strickler* with him), for plaintiff in error.

Carpenter, for defendant in error.

The opinion of the court was delivered by

SHARSWOOD, C. J.—The offence is sufficiently charged in the information. The finding of facts by the alderman is clear, full and specific, and brings the case within the statute. The evidence showed the place of business was kept open on Sunday and an employee was selling cigars. The plaintiff was present a part of the day, and the conclusion is fully justified that the business was

carried on with his knowledge and by his authority. The principal as well as the clerk was liable under the statute.

Judgment affirmed.

The liability of a principal for the acts of his agent is a question governed by very different principles and considerations according as the liability, with which it is sought to affect the principal, is of a civil or a criminal nature. Civilly, of course, the law is well settled, that the principal is liable for all the acts of his agent, done in the course and within the line of his employment, and while acting as the servant of the principal. As to third-persons the servant stands as the master; the latter has held him out as his authorized representative, and must bear the consequences resulting from the relationship which he has himself established, even if the particular act of the agent for which it is sought to hold the principal responsible, be one which, if he had been present, he would not have approved.

But when criminal liability is considered, the consequences of which affect not merely the pocket, but the reputation and liberty of the accused, we must have regard to something more than a mere delegation of authority. Into crime a moral element enters; there must be, in general, an evil intent, to constitute a man a criminal, and it would be carrying the principle of representation by an agent too far, to hold that the servant represents the moral nature, the moral action of his master, and that an illegal act of his, which might very properly subject the master to a civil action for damages, should at the same time render the master accountable and liable to punishment for a crime with which he was in no way connected except by sustaining the relation of master to the criminal. Of course the above considerations do not imply that a man cannot be guilty of a crime through his servant and be punishable therefor.

Qui facit per alium, facit per se will apply in criminal cases, and indeed, there may be cases wherein the entire guilt rests upon the master who commands the commission of the crime, and not upon the servant by whose hand it is ignorantly committed. A good illustration is found in *Regina v. Bleasdale*, 2 C. & K. 764 (1848), where the defendant being lessee of a mine, mined subterraneously into other lands, and thus stole coal to the value of some 10,000/. The court held Bleasdale accountable and not the ignorant miners; the law being stated thus: "If a man does, by an innocent agent, a felony, the employer and not the agent is accountable criminally."

The general rule may be thus formulated: A principal is not criminally liable for the acts of his agent, unless the act be done by his command or with his assent, express or implied.

What evidence will authorize a finding of assent or command is a matter of some interest, and different views as to the amount of proof necessary have been taken.

In the case of the *State v. McGrath*, 73 Mo. 181, defendant was indicted for illegal sales of liquor made by his clerk. It seems to have been admitted that the sale by a recognised business agent was *prima facie* proof of direction to make such sale by the master, and the contention turned solely on the refusal of the court below to allow the presumption to be rebutted by evidence of what the master's instructions really were. The Supreme Court held that such evidence was admissible, and reversed the judgment. That a sale by the servant is *prima facie* evidence of direction by the master seems to be established law in Missouri, for

although *SHERWOOD, C. J.*, in *State v. Baker*, 71 Mo. 475 (1880), says, "The maxim *qui facit per alium, facit per se*, cited on behalf of the state is only applicable where the instructions are obeyed, not where they are, as the evidence offered tended to show, palpably violated;" still, in that case, the prosecution offered no evidence of direction by the defendant, whose wife and brother had made the illegal sale for which the defendant stood indicted, and the reversal went upon the ground of the exclusion of the defendant's evidence.

This view of the law seems to be supported by the case of the *Commonwealth v. Gillespie*, 7 S. & R. 469 (1822), although that case may be distinguished from the foregoing by the fact that there were certain significant omissions of evidence of innocence, presumably within the control of the defendant, which omissions were considered as strengthening the case of the prosecution. *Gillespie*, who did not live in Philadelphia, had opened in that city a lottery office, and had kept it for several years. He occasionally visited the city and his office, leaving it in the interim in charge of a lad. The boy, in his employer's absence, sold an illegal lottery ticket endorsed in the name of *Gillespie*. An indictment for conspiracy to sell illegal lottery tickets was found against the boy and *Gillespie*. After a conviction there were motions for a new trial and in arrest of judgment. The Supreme Court sustained the conviction, *DUNCAN, J.*, saying: "I did not instruct the jury that *Gillespie* was criminally answerable for the act of his agent or servant, but I left them to decide whether, from the whole body of the evidence, *Gillespie* was concerned in the sale of this ticket. The house his; the boy conducting business for him as a lottery broker under his sign, selling this very ticket as his agent and in his name. These were circumstances from which the jury might infer his partici-

pation in the sale of the ticket; more especially as, if the boy had been employed as his agent to sell tickets authorized by the laws of the state and not tickets prohibited, a production of his books would establish his innocence. That criminality, even in acts of the blackest die, might be made out by circumstantial evidence, I put to the jury as examples, libels, sold by a child in the shop of a printer; tippling-houses, liquor sold by a boy; bawdy-houses, where the keeper kept out of view herself, though she was the owner of the house; and I did put it to the jury as a case in which the *evidentiæ rei*, the *res ipsa loquitur*, might afford satisfactory evidence of the participation of *Gillespie*." See also, *Commonwealth v. Nichols*, 10 Met. 259.

But authority may also be found requiring further evidence than that implied from the mere relation of master and servant to make even a *prima facie* case of guilt of the former, even in cases of the same class as the foregoing. Thus, in *People v. Uiter*, 44 Barb. 170 (1864), an indictment was found against a tavern keeper for selling liquor on Sunday, in contravention of a statute. The evidence showed that liquor had been illegally sold in the defendant's house by his bartender. The defence requested the court to charge that, to justify a conviction it was not sufficient to prove that liquor had been sold in the defendant's house on Sunday, but that it must be shown that the defendant did the act personally, or that it was done by his direction or with his assent. The court refused so to charge, but instructed the jury that if they believed that the bartender had sold liquor in the defendant's tavern on Sunday, they might convict, although the defendant was not present at the sale, and was not shown to have authorized it: but that if the defendant had forbidden the sale and it was made in disobedience of his orders, he should be acquitted. It was

held that the court erred in not affirming the defendant's point.

In the principal case, the Supreme Court, in affirming the conviction, relied on the presence of the defendant as evidence of his knowledge of and assent to the violation of the law. In *Morse v. State*, 6 Conn. 9 (1825), it was held that a ratification of an illegal act of an agent would not render the employer criminally liable therefor. The defendant's barkeeper had given credit to a student of Yale College, contrary to statute, and the defendant subsequently ratified the credit. He was indicted and tried, but the Supreme Court held that he was not indictable. *Hosmer, C. J.*, saying: "In the law of contracts a posterior recognition in many cases is equivalent to a preceding command; but it is not so in respect of crimes. The defendant is responsible for his own acts and for those of others done by his express or implied command, but to crimes, the maxim *omnis ratihabitio retro trahitur, et mandato equiparatur*, is inapplicable."

In the conflict of authority, it may be a little difficult to say what should be the rule of evidence. On the one hand, it may be said, with great force, that there are some crimes to which the principal may be a party, though the agent only appears therein, of a character such that it would be almost impossible to convict the guilty principal if the act of his known agent were to be excluded from the consideration of the jury, as making a *prima facie* case, and that as the laws of criminal evidence have now generally made the prisoner a witness on his own behalf, no injustice is done or hardship inflicted by calling on him, after showing the illegal act of his agent apparently for the profit of the employer, to clear himself by showing what were the instructions given to his agent, and that the defendant himself did not know of or assent to the acts violating the law.

On the other hand, it is to be remem-

bered that a man testifying under a charge, appears to the jury under a great disadvantage, and his manifest interest in his own testimony would naturally go far to discredit him. On the whole, it would seem that the safest rule, and one most in accordance with the spirit of our laws is to hold the prosecution to give some testimony either direct or circumstantial, connecting the defendant with a crime, other than is to be found in the fact that the defendant's servant committed an offence in which his master might possibly have an interest.

To the general rule of liability above stated, we have found two exceptions. The first and best known is that in the case of corporations, which may be indicted for acts of their agents. As a corporation is a body without a soul, and is not possessed of moral attributes, it was for a long time thought and it is frequently stated in old books, that a corporation could not be made criminally answerable. This idea, however, has now been abandoned. The only authority or thing resembling authority for it to be found in the early books is comprised in the declaration in *Sutton's Hospital*, 10 Coke 32, that a corporation cannot commit treason, and the anonymous case in 12 Mod. 559, where Lord Holt is reported as saying that "A corporation is not indictable, but the particular members of it are." Upon this very slender basis was built up the edifice now overthrown.

As a corporation can act only through its agents, it follows that, if it is indictable, it is then criminally liable for the acts of its servants. At the present day, there is no doubt of the indictability of a corporation other than a municipal one: *Queen v. Birmingham & Gloucester Railway Co.*, 2 G. & D. 236 (1842); *Regina v. Great North of England Railway Co.*, 9 A. & E. (N. S.) 315 (1846); *State v. Morris & Essex Railroad Co.*, 3 Zab. 360 (1852); *Commonwealth v. Proprietors of New Bedford Bridge*, 2

Gray 339 (1854); *Delaware Division Canal Co. v. Commonwealth*, 10 P. F. Smith 367 (1869); and this liability to indictment has been extended even to municipal corporations: *People v. Corporation of Albany*, 11 Wend. 539.

A distinction has been taken between an indictment of a corporation for non-feasance and one for misfeasance, and while the former has been almost universally admitted as proper, it has been denied that the latter can be sustained. The question of the indictability of a corporation for misfeasance arose in this country in *The State v. Great Works Milling and Manufacturing Co.*, 20 Me. 41 (1841), in which the defendant corporation was indicted for illegally erecting a dam. The court held that the indictment would not lie, taking the broad ground that it was impossible for a corporation to commit a crime, even by direct instructions under seal to an agent, for such direction would be *ultra vires*, and that, therefore, however an indictment might be used to complete the doing of an act which a corporation was bound to do and had neglected, an indictment for misfeasance could not be sustained.

The question came before the Queen's Bench in 1846, in *Regina v. Great North of England Railway Co.*, *supra*, and was fully considered. The company was indicted for cutting through and obstructing a highway by works performed in a course not conformable to the powers conferred by Act of Parliament upon the company. Lord DENMAN, in the course of his opinion, said: "The argument is, that for a wrongful act, a corporation is not amenable to an indictment, though for a wrongful omission, it undoubtedly is, assuming in the first place that there is a plain and obvious distinction between the two species of offence. No assumption can be more unfounded. * * * But if the distinction were easily discoverable, why should a corporation be liable for one species of offence and

not for the other? * * * It is as easy to charge one person or a body corporate with erecting a bar across a public road, as with the non-repair of it, and they may as well be compelled to pay a fine for the act as for the omission. * * * We are told that this remedy is not required because the individuals who concur in voting the orders or in executing the work, may be made answerable for it by criminal proceedings; of this there is no doubt. But the public knows nothing of the former; and the latter, if they are identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy be indictment against those who truly commit it, that is, the corporation acting by its majority; and there is no principle which places them beyond the reach of such proceedings." The court held the company indictable.

The question again arose in this country in 1852, this time before the Supreme Court of New Jersey, in *The State v. The Morris & Essex Railroad Co.*, 3 Zab. 360, and both the foregoing authorities were cited to the court, which determined to follow the English rather than the American precedent. GREEN, C. J., delivered a very learned and able opinion, admitting that an indictment would not lie against a corporation for an offence of which a corrupt intent or *malus animus* is an essential ingredient, but showing conclusively that the position taken by the Queen's Bench as to misfeasance of the class of which the erection of a nuisance is an example, was sound and correct. This doctrine was cited and followed in *Commonwealth v. The Proprietors of New Bedford Bridge*, 2 Gray 339 (1854), in which case the court adverted to the impossibility of preventing a public nuisance otherwise than by indictment. The law

may now be regarded as settled, that a corporation may be indicted for misfeasance, subject to the limitation expressed in the *State v. The Morris & Essex Railroad Co.* See, in addition to the above, *State v. Vermont Railroad Co.*, 30 Vt. 108 : *Louisville & Nashville Railroad Co. v. State*, 3 Head 523 (1858). Opposed, however, to the general current stand the Maine case above cited, and *The State v. Ohio & Miss. Railroad Co.*, 23 Ind. 362 (1864), in which the Supreme Court of Indiana cited and followed the *State v. Great Works Milling and Manufacturing Co.*, *supra*.

The second exception is not so well established as the first, but it has been recognised in England by high authority, and may be stated as follows, that where the principal carries on a business with his own capital for his own profit, and employs servants who so conduct the business as to make it a public nuisance, and the proceedings to remedy the same are criminal in form only, the principal will be held liable to an indictment without proof of any participation in or knowledge of the illegal acts on his part. The case in which the exception was announced is the *The Queen v. Stephens*, L. R., 1 Q. B. 702 (1866). The defendant was the owner of a quarry, and was indicted for throwing rubbish therefrom into a river. Evidence was offered to show that the defendant was an old man, who did not personally superintend his quarry, and had prohibited his workmen from throwing the rubbish into the river. BLACKBURN, J., held the evidence immaterial, and the jury gave a verdict of guilty. On the case coming before the court in banc, MELLOR, J., said: "It is quite true that this, in point of form, is a proceeding of a criminal nature, but in substance, I think it is in the nature of a civil proceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in the indictment, between proceedings which are

civil and proceedings which are criminal, I think there may be nuisances of such a character that the rule I am applying here would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action. Then if the contention of those who say the direction is wrong is to prevail, the public would have great difficulty in getting redress. The object of this indictment is to prevent the recurrence of this nuisance. The prosecutor cannot proceed by action, but must proceed by indictment, and if this were a strictly criminal proceeding, the prosecution would be met with the objection that there was no *mens rea*; that the indictment charged the defendant with a criminal offence, when in reality there was no proof that the defendant knew of the act or that he himself gave orders to his servants to do the particular act he is charged with; still, at the same time, it is perfectly clear that the defendant finds the capital and carries on the business which causes the nuisance, and it is carried on for his benefit; although as from age or infirmity the defendant is unable to go upon the premises, the business is carried on for him by his sons, or at all events by his agents. Under these circumstances the defendant must necessarily give to his servants or agents all the authority which is incident to the carrying on of the business. It is not because he had, at some time or other, given directions that it should be carried on so as not to allow the refuse from the works to fall into the river, and desired his servant to provide some other place for depositing it, that when it has fallen into the river and has become prejudicial to the public, he can say he is not liable on an indictment for a nuisance caused by the acts of his servants.

* * * Inasmuch as the object of this indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action, would be sufficient to support an indictment." SHEA, J., concurred with MELLOR, J.

BLACKBURN, J., said: "I only wish to guard myself against it being supposed that, either at the trial or now, the general rule that a principal is not criminally answerable for the act of his agent is infringed. All that it is necessary to say is that when a person maintains works by his capital and employs servants, and so carries on the works, as in fact to cause a nuisance to a private right for which an action would lie, if the same nuisance inflicts an injury upon a public right, the remedy for which would be by indictment—the evidence which would maintain the action would also support the indictment; that is all that it was necessary to decide, and all that is decided."

There is also what, at first blush,

seems another exception to the rule of criminal liability of the employer for the act of his servant, and that is the case of the publisher of a newspaper, who is held criminally accountable for a libel appearing in his paper, without proof of any knowledge on his part of the insertion or the contents of the libellous article. This liability, however, we think, does not constitute such an exception, but rests on a different basis, the ignorant publisher being held responsible for criminal negligence in allowing the libellous matter to be inserted, through not taking sufficient and proper means to prevent his columns being used for wrongful purposes. That this is the true ground of the publisher's liability in such case, appears from the fact that he may shield himself by establishing the fact that he has exercised due care in directing his paper, and that the libel was published notwithstanding such care: 2 Whart. Crim. Law, sect. 2583; *Commonwealth v. Magan*, 107 Mass. 199.

HENRY BUDD.

Philadelphia.

Supreme Court of the United States.

HAWES v. THE CONTRA COSTA WATER COMPANY ET AL.

An individual stockholder of a corporation cannot maintain against the corporation and a third party with whom it is dealing, a suit in equity to protect the interests of the corporation or to enforce its rights against such third party, unless there exists:

Some action or threatened action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred by their charter or other source of organization; or,

Such a fraudulent transaction, completed or threatened, by the acting managers, in connection with some other party or among themselves, or with the other shareholders, as will result in serious injury to the corporation or to the interests of the other shareholders; or,

Where the board of directors, or a majority of them, are acting for their own interests, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or,

Where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

It must also be alleged in the bill, which should be verified by affidavit, that plaintiff has made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation ; that he was the owner of the stock on which he claims the right to sue, at the time of the transactions of which he complains, or that it has since devolved on him by operation of law ; and, that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it would otherwise have no cognizance.

APPEAL from a decree in chancery of the Circuit Court for the District of California dismissing the appellant's bill.

The plaintiff, who is a citizen of New York, alleges himself to be a stockholder in the Contra Costa Waterworks Company, a California corporation, and filed his bill on behalf of himself and all other stockholders who may choose to come in and contribute to the costs and expenses of the action.

The defendants were the city of Oakland, the Contra Costa Waterworks Company and Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook and John W. Coleman, trustees and directors of said company.

The foundation of the complaint was that the city of Oakland claimed at the hands of the waterworks company water, without compensation, for all municipal purposes whatever, including watering the streets, public squares and parks, flushing sewers and the like, whereas it was only entitled to receive water free of charge in cases of fire or other great necessity ; that the waterworks company complied with this demand to the great loss and injury of the company, and to the diminution of the dividends which should come to himself and other stockholders, and the decreased value of their stock. The allegation of plaintiff's attempt to get the directors of the company to correct this evil was as follows :

“ On the 10th day of July 1878, he applied to the president and board of directors or trustees of said water company, and requested them to desist from their illegal and improper practices aforesaid, and to limit the supply of water free of charge to said city, to cases of fire or other great necessity, and that said board should take immediate proceedings to prevent said city from taking water from the works of said company for any other purpose without compensation ; but said board of directors and trustees have wholly declined to take any proceedings whatever in the premises, and threaten to go on and furnish water to the extent of said company's means to said city of Oakland free of charge, for all muni-

cipal purposes, as has heretofore been done, and in cases other than cases of fire or other great necessity, except as for family uses hereinbefore referred to; and your orator avers that by reason of the premises, said water company and your orator and the other stockholders thereof have suffered, and will, by a continuance of said acts, hereafter suffer great loss and damage."

To this bill the waterworks company and the directors failed to make answer, and the city of Oakland filed a demurrer, which was sustained by the court and the bill dismissed. Complainants then took this appeal.

The opinion of the court was delivered by

MILLER, J.—Two grounds of demurrer were set out and relied on in the court below, and are urged upon us on this appeal. They are:

1. That appellant has shown no capacity in himself to maintain this suit, the injury, if any exists, being to the interests of the corporation, and the right to sue belonging solely to that body.

2. That the city of Oakland is entitled to receive, free of compensation, all the water which it is charged to be so using in this bill, by a sound construction of the law under which the company is organized.

The first of these causes of demurrer presents a matter of very great interest, and of growing importance in the courts of the United States.

Since the decision of this court in the case of *Dodge v. Woolsey*, 18 Howard 331, the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporations whose rights are to be enforced have no right to sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

This practice has grown until the corporations created by the laws of the states bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of the state courts, which are their natural, their lawful and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having

such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another state. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery, namely: one against his own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the circuit court of the United States, because he is a citizen of a different state, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another state, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the federal court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction.

That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted, and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the cor-

poration, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member.

The case before us goes beyond this.

This corporation, like others, is created a body politic and corporate that it may in its corporate name transact all the business which its charter or other organic act authorizes it to do.

Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts and incur liabilities, and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon any liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.

The principle involved in the case of *Dodge v. Woolsey* permits the stockholder in one of these corporations to step in between that corporation and the party with whom it has been dealing and institute and control a suit in which the rights involved are the rights of the corporation, and the controversy one really between that corporation, entirely capable of asserting its own rights, and the other party, who is equally so.

This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, cannot be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognised as exceptional in their character and calling for the extraordinary powers of a court of equity. It is, therefore, always a question of equitable jurisprudence, and as such has within the last forty years, received the repeated consideration of the highest courts of England and of this country.

The earliest English case in which this subject received any very careful consideration is that of *Foss v. Harbottle*, before Vice-Chancellor WIGRAM, whose very full and able opinion is

reported in 2 Hare's Ch. R. 488. The case was decided in 1843 on a demurrer to the bill, which was brought by Foss and Turton, two shareholders in an incorporation called the Victoria Park Company, on behalf of themselves and all other stockholders, except those who were made defendants, against the directors and one shareholder not a director, and against the solicitor and architect of the company. The bill charged the defendants with concerting and effecting various fraudulent and illegal transactions, whereby the property of the company was misapplied, aliened and wasted. It alleged that there had ceased to be a sufficient number of qualified directors to constitute a board; that the company had no clerk or office; and it prayed for the appointment of a receiver and a decree against the defendants to make good the loss. After showing that the case was one in which the right of action was in the company, the vice-chancellor says: "In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this, and the only question can be, whether the facts alleged in this case justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative." Again, after pointing out that cases may arise where the claims of justice would be found superior to the technical rules respecting the mode in which corporations are required to sue, he adds:

"But, on the other hand, it must not be without reasons of a very urgent character that the established rules of law and practice are to be departed from, rules which, though in a sense technical, are founded on the general principles of justice and convenience; and the question is whether a case is stated in this bill entitling plaintiffs to sue in their private character." He then in an elaborate argument holds that the bill is fatally defective because it does not aver that there is no acting or *de facto* board of directors who might have ordered the bringing of this suit; and, secondly, that it was the duty of the plaintiffs—the two shareholders who complain of what had been done—to have called a meeting of the shareholders or attended at some regular annual meeting and obtained the action of a majority on the matters in issue. The majority, he says, may have been content with what was done and may have ratified the action of the board, in which case the whole body would have been bound by it.

The demurrer was sustained and the bill dismissed.

In the subsequent case of *Mozley v. Alston*, 1 Phillips's Ch. R. 790, decided in 1847, Lord Chancellor LYNTHURST says that "the observations of the vice-chancellor in *Foss v. Harbottle* correctly represent what is the principle and practice of the court in reference to suits of this description."

These cases have been referred to again and again in the English courts as leading cases on the subject to which they relate and always with approval.

In the case of *Gray v. Lewis*, decided in the Chancery Appeals, in 1873, Sir W. M. JAMES, L. J., said: "I am of opinion that the only person, if you may call it a person, having a right to complain was the incorporated society called Charles Lafitte & Co. In its corporate character it was liable to be sued and was entitled to sue, and if the company sued in its corporate character, the defendant might allege a release or compromise by the company in its corporate character—a defence which would not be open in a suit where a plaintiff is suing on behalf of himself and other shareholders. I think it is of the utmost importance to maintain the rule laid down in *Mozley v. Alston* and *Foss v. Harbottle*, to which, as I understand, the only exception is, where the corporate body has got into the hands of directors, and of the majority, which directors and majority are using their power for the purpose of doing something fraudulent against the minority, who are overpowered by them, as in *Atwood v. Merryweather*, where Vice-Chancellor WOOD sustained a bill by a shareholder on behalf of himself and others, and there it was after an attempt had been made to obtain proper authority from the corporate body itself in a public meeting assembled:" Law Rep., 8 Ch. 1035.

But perhaps the best assertion of the rule and of the exceptions to it are found in the opinion of the court by the same learned justice in the case of *McDougall v. Gardiner*, in 1875, Law Rep., 1 Chan. Div. 21: "I am of opinion," he says, "that this demurrer ought to be allowed. I think it is of the utmost importance in all these controversies that the rule which is well known in this court as the rule in *Mozley v. Alston*, and *Lord v. Copper Mining Co.*, and *Foss v. Harbottle*, should always be adhered to; that is to say, that nothing connected with internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something

illegal, oppressive or fraudulent—unless there is something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it, but that every litigation must be in the name of the company if the company really desire it. Because there may be a great many wrongs committed in a company, there may be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a variety of things of which a company may well be entitled to complain but which, as a matter of good sense, they do not think it right to make the subject of litigation, and it is the company as a company which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation or whether it will take steps to prevent the wrong from being done."

The cases in the English courts are numerous, but the foregoing citations give the spirit of them correctly.

In this country the cases outside of the federal courts are not numerous, and while they admit the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud, or a breach of trust, or are proceeding *ultra vires*. See *March v. Eastern Railroad Co.*, 40 N. H. 549; *Peabody v. Flint*, 6 Allen (Mass.) 52; *Brown v. Boston Theatre*, 104 Mass. 378, where the general doctrine and its limitations are very well stated. See also *Hersey v. Veazie*, 24 Me. 9, and *Samuel v. Holladay*, 1 Woolworth 400.

The case of *Dodge v. Woolsey*, decided in this court in 1855, is, however, the leading case on the subject in this country.

And we do not believe, notwithstanding some expressions in the opinion, that it is justly chargeable with the abuses we have mentioned. It was manifestly well considered, and the opinion is unusually long, discussing the point now under consideration with a full reference to the decisions then made in the courts of England. The suit—a bill in chancery—was brought in the Circuit Court for the District of Ohio by Woolsey, a stockholder of the Commercial Bank of Cleveland, and a citizen of Connecticut, against that bank, its managing directors, and Dodge, tax-collector of the county in which the bank was situated, citizens of Ohio. The bill alleged that Dodge had levied upon property of the bank to make collection of a tax, which by the Constitution of the state

of Ohio, the bank was bound to pay; that in that respect the Constitution, then recently adopted, impaired the obligation of the contract of the state with the bank, contained in its charter. It appeared in the case that Woolsey had, by letter directed to the board of directors, requested them to institute proceedings to prevent the collection of this tax, but the board, by a resolution, declined to take any such action, while expressing their opinion that the tax was illegal. In the opinion of the court, reciting the circumstances which justified its interposition at the suit of the stockholder, the allegation of the bill is adverted to, that if the taxes are enforced it will annul the contract with the state concerning taxation, and that the tax is so onerous upon the bank that it will compel a suspension and final cessation of its business. The following extract from Angell & Ames on Corporations is cited with approval: "Though the result of the authorities clearly is that in a corporation, when acting within the scope of, and in obedience to, the provisions of its constitution, the will of the majority, clearly expressed, must govern, yet beyond the limits of the act of incorporation the will of the majority cannot make the act valid, and the power of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension or simple negligence on the part of the directors." And the court adds: "It is obvious from this rule that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought."

A very large part of the opinion is devoted to the consideration of the high function of this court in construing the Constitution of the United States, and it is impossible not to see the influence on the mind of the writer of that opinion, of the fact that the only question on the merits of the case was one which peculiarly belonged to the federal judiciary, and especially to this court to decide, namely, whether the Constitution of the state of Ohio violated the obligation of the contract concerning taxation found in the charter of the bank.

As the law then stood there was no means by which the bank, being a citizen of the same state with Dodge, the tax-collector,

could bring into a court of the United States the right which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a state court from the Supreme Court of the United States.

That difficulty no longer exists, for by the Act of March 3d 1875, all suits arising under the Constitution or laws of the United States may be brought originally in the Circuit Courts of the United States without regard to the citizenship of the parties. Under this statute, if it had then existed, the bank in the case of *Dodge v. Woolsey* could undoubtedly have brought suit to restrain the collection of the tax in its own name, without resort to one of its shareholders for that purpose.

And this same statute, while enlarging the jurisdiction of the Circuit Courts in cases fairly within the constitutional grant of power to the federal judiciary, strikes a blow by its fifth section at improper and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them. It declares if at any time in the progress of a case, either originally commenced in a Circuit Court, or removed there from a state court, it shall appear to said court "that such suit does not really involve a dispute or controversy properly within the jurisdiction of said court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was removed."

It is believed that a rigid enforcement of this statute by the circuit courts would relieve them of many cases which have no proper place on their dockets.

This examination of the case of *Dodge v. Woolsey* satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of Congress referred to, leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization ;

Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders ;

Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders ;

Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

But in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or

that his shares has devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognisance, should be in the bill, which should be verified by affidavit.

It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court.

He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action. No attempt to consult the other shareholders to ascertain their opinions, or obtain their action. But within five days after his application to the directors this bill is filed. There is no allegation of fraud or of acts *ultra vires*, nor of destruction of property, or of irremediable injury of any kind.

Conceding appellant's construction of the company's charter to be correct, there is nothing which *forbids* the corporation from dealing with the city in the manner it has done. That city conferred on the company valuable rights by special ordinance, namely, the use of the streets for laying its pipes, and the privilege of furnishing water to the whole population. It may be the exercise of the highest wisdom to let the city use the water in the manner complained of. The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it and be content to abide by the action of their directors.

If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?

This question answers itself, and without considering the other point raised by the demurrer, we are of opinion that it was properly sustained, and the bill dismissed, because the appellant by that bill shows no standing in a court of equity—no right in himself to prosecute this suit.

The decree of the Circuit Court is, therefore, affirmed.

Supreme Court of Rhode Island.

FRANCES E. GARDNER v. JAMES PECKHAM ET ALS.

The doctrine of *lis pendens* cannot be extended to support, after a decree in an equity proceeding involving the title to land, a bill against third parties to recover the value of wood cut therefrom pending the proceeding.

Pending a bill in equity affecting the title of realty, third persons with the consent of the respondents cut, carried off and appropriated quantities of wood and brush from the realty in question. After a decree in his favor the complainant filed another bill in equity against these third persons to ascertain the amount of stuff cut and carried off by them, which was charged to be of the value of five hundred dollars, and to enforce payment from them. This bill charged no conspiracy with the former respondents, nor any attempt to commit actual fraud. The respondents demurred. *Held*, that the bill was virtually an action of trover and conversion for wood cut pending the former bill, and could not be maintained.

BILL IN EQUITY for discovery, to ascertain the amount of timber cut by the respondents, pending a bill in equity affecting the title to the realty, and to enforce payment for the timber.

The bill alleged that in November 1875 the complainant, being the owner of a farm of one hundred and fifty acres in the town of Gloucester, was fraudulently induced by one Peter Kiernan to convey the farm to him in exchange for five lots of land in the city of Providence; that the said Peter, after receiving the deed of the farm, conveyed it to his six children, named; that in November 1876, the complainant being satisfied that she had been defrauded, commenced a suit against said Peter and his children, to procure a reconveyance of the farm and the improvements thereon; that she prosecuted the suit diligently to final decree, which was entered February 21st 1880, directing a reconveyance of the farm and improvements. The bill also alleged that at the time the farm was conveyed to Peter Kiernan a considerable portion of it was wooded, and that during the pendency of her suit against said Peter and his children, the defendants, one of whom had actual notice of the suit, entered on the farm, and with the consent of said Peter or his children cut and carried away a large quantity of the wood and brush growing thereon, of the estimated value of five hundred dollars. Complainant prayed for a decree for the value of the wood and brush so cut and carried away. Defendants demurred.

William H. Baker, for complainant.

Z. O. Slocum, for respondents.

The opinion of the court was delivered by

DURFEE, C. J.—The bill does not allege that the defendants conspired with Peter Kiernan and his children to defraud the complainant, nor to frustrate her suit to any extent, nor does it charge them with an intent to commit any actual fraud of any kind upon her. It is true the bill states that one of the defendants knew of the former suit, but the defendant having this knowledge does not appear to have been connected in business with the other defendants, nor to have sustained any relation to them by virtue of which what he knew could be imputed to them as something that they knew; and the bill, though it does not seek to charge all the defendants jointly for the wood, seeks, nevertheless, to charge them all alike on the same ground. The ground of relief is simply that the defendants cut and carried away the wood and brush during the pendency of her former suit, and that, the wood and brush having been involved in that suit as a part of her farm, she is entitled to recover its value of the defendants by force of the doctrine of *lis pendens*.

The doctrine of *lis pendens* is this, that real property, or, to some extent, personal property, when it has been put in litigation by a suit in equity, in which it is specifically described, will, if the suit is prosecuted with diligence, be bound by the final decree, notwithstanding any intermediate alienation. It will be seen that the doctrine as stated does not reach the case at bar, for, in the case at bar, the complainant is seeking to recover, not any property which is bound by the decree, but the value simply of certain property which was not bound by the decree, but which, in all probability, had been burned up before the decree was entered. She cites no satisfactory precedent for such an extension of the doctrine. The question is, can it be so extended. We think not. The doctrine is founded on the policy that property which is specifically sued for shall abide the result of the suit, for otherwise, by successive alienations, the litigation might be indefinitely prolonged: *Bellamy v. Sabine*, 1 De G. & J. 566. The doctrine relates only to changes of ownership, but assumes that the property itself will remain either identically the same or be at least specifically traceable into some new form in which it can be reached. That is not the case here. The suit here is in the nature of an action of trover and conversion. It seeks not the thing, but the value of the thing, or damages for its conversion. It is a mere personal claim. If the

suit can be maintained, we do not see why, on the same principle, similar suits cannot be maintained against purchasers for the value of hay, corn, potatoes, or fruits raised on the farm and sold. Certainly it never has been supposed that a suit to annul the conveyance of a farm could entail such results. We do not think public policy, which is the source of the doctrine of *lis pendens*, requires that it should entail them. The doctrine is not a favorite of the courts, and will not be extended without strict necessity: *Leitch v. Wells*, 48 N. Y. 585. It is only because wood is a more permanent part of a farm than its other products that we feel any inclination to entertain the suit. But we are not prepared to entertain it on that account, in the absence of any charge of actual fraud. We think the complainant, if not satisfied with the personal responsibility of Peter Kiernan and his children, should have applied for an injunction, or some other preventive order, to protect her interests.

We must, therefore, sustain the demurrer and dismiss the bill with costs. Demurrer sustained.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ERRORS OF CONNECTICUT.²

SUPREME COURT OF GEORGIA.³

SUPREME COURT OF ILLINOIS.⁴

SUPREME JUDICIAL COURT OF MASSACHUSETTS.⁵

SUPREME COURT OF OHIO.⁶

ADMIRALTY.

Jurisdiction—Damages resulting from Loss of Life—Prohibition.—While down to a recent period the courts of admiralty have followed the rule of the common law in deciding that damages could not be recovered for an injury causing death, yet it is clearly within the power of the courts of admiralty to determine whether the recent legislation giving a right of action to those pecuniarily interested in the life of the person killed, has not wrought a corresponding change in the laws which

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

² From John Hooker, Esq., Reporter; to appear in 48 Connecticut Reports.

³ From J. H. Lumpkin, Esq., Reporter; to appear in 66 Georgia Reports.

⁴ From Hon. N. L. Freeman, Reporter; to appear in 101 Illinois Reports.

⁵ From John Lathrop, Esq., Reporter; to appear in 131 Massachusetts Reports.

⁶ From E. L. DeWitt, Esq., Reporter; to appear in 37 or 38 Ohio St. Reports.

govern their jurisdiction : *Ex parte Gordon*, S. C. U. S., Oct. Term 1881.

A writ of prohibition, therefore, will not be granted to restrain an admiralty court from proceeding in a cause instituted to recover damages for loss of life occasioned by a collision : *Id.*

AGENT.

Building Agreement—Architect—Extra Work.—A builder made a written contract to furnish the materials and build a house for the defendant according to definite plans and specifications, and for a fixed sum, all the materials and work to be accepted by an architect named, who was to superintend the construction. The builder, under the direction of the architect, did certain work variant from and in addition to the specifications, which increased the cost and value of the house. *Held*, That the ordering of this work was beyond the scope of the architect's agency, and that the defendant was not liable to the builder for it : *Starkweather v. Goodman*, 48 Conn.

When the house was nearly completed the builder gave the defendant a written statement of the extra work and materials, to which the latter made no objection at the time. *Held*, That he was not estopped thereby from making the objection afterwards : *Id.*

ATTORNEY. See *Label* ; *Set-off*.

BILLS AND NOTES. See *Surety*.

Payment—Presumption from Possession of Note—Payment of Interest.—The possession of a promissory note in the hands of the personal representative of the payee, unexplained, is *prima facie* evidence that it has not been fully paid, and when it is produced in evidence, the burden of proof is on the maker to establish payment, by a preponderance of evidence : *Ritter v. Schenk*, 101 Ill.

The payment of interest on the amount claimed to be due when the note was in fact fully paid, the holder claiming compound interest, will not conclude the maker from afterwards proving a prior payment in full, where such payment of interest was made in ignorance of his rights : *Id.*

Sale of Note—Warranty of Solvency of Maker.—If a person sells a promissory note, the maker of which at the time is insolvent, but has not stopped payment nor been adjudged bankrupt or insolvent, and the seller does not know of the maker's actual insolvency, the seller does not warrant the solvency of the maker : *Day v. Kinney*, 131 Mass.

COMMON CARRIER.

Limitation of Liability—Railroad—Last Road of Through Line.—A general stipulation or notice in a bill of lading will not limit the liability of a common carrier ; an express contract is necessary for that purpose : *Georgia R. & B. Co. v. Gann*, 66 Geo.

An express contract will not protect a common carrier from the results of its own negligence in running its trains : *Id.*

Where goods are shipped over a connecting line of railroads, the last road of the line receiving them as in good order, for transportation, is liable to the consignee for damages : *Id.*

Goods were billed from St. Louis, Missouri, to Athens, Georgia; as far as Atlanta, Georgia, through rates of freight were paid, and from Atlanta to Athens local rates were charged. *Held*, That even if this did not make the Georgia Railroad (from Atlanta to Athens) liable as the last road of a through line, still the receipt by it of the goods for transportation without exception was impliedly a receipt as in good order, and would render that road liable for damages occurring thereto: *Id.*

COURT.

Jurisdiction—When it may be Collaterally Attacked.—The jurisdiction of courts of limited and inferior jurisdiction can be collaterally attacked, and if the want of jurisdiction in fact exists, the judgment is an absolute nullity: *Culver's Appeal*, 48 Conn.

CRIMINAL LAW.

Larceny—Fixtures—Trespass.—When things attached to the realty are detached therefrom, they at once become personalty, and are the subject-matter of larceny even by the person so detaching them: *Beal v. State*, 66 Geo.

The difference between simple larceny and one form of trespass is that the former is the wrongful and fraudulent taking and carrying away of the personal goods of another with intent to steal the same; the latter is the taking and carrying away the personal goods or property of another without his consent: *Id.*

DEBTOR AND CREDITOR.

Change of Possession.—The defendant, who was in the employment of M. upon his farm, bargained with him for the purchase of a horse which M. had for some time owned and kept on the farm, when he should have earned the money to pay for it. The horse remained on the farm as before, and two years after M. sold it to the defendant, taking his receipt in full for wages earned in payment. The horse still remained on the farm and was kept in M.'s stable, the defendant continuing in his service, and feeding it from M.'s hay and grain as before, paying a certain sum per week for its keeping. The defendant took exclusive care of the horse, breaking it to harness, and keeping it shod, and claiming to own and be in possession of it. About two months after the sale the horse was attached by one of M. creditors. *Held*, that there had been no such change of possession as made the sale good against the creditors of M.: *Hull v. Sigsworth*, 48 Conn.

DEED.

Boundaries—Descriptions—Surveyor's Monuments.—It is well-settled law that the monuments established by a surveyor at the time of making the survey will always prevail over written descriptions when a contradiction exists: *People v. Stahl*, 101 Ill.

Any description of land or a lot, for purposes of taxation, by which it may be identified by a competent surveyor with reasonable certainty, either with or without extrinsic evidence, is sufficient: *Id.*

Delivery—What does not amount to.—Where a deed is executed and delivered to a stranger, to be delivered to the grantee, without con-

ditions, it will be a sufficient delivery to pass the title; but the execution of a deed, and having it recorded, without the knowledge of the grantee, is not a delivery: *Byars v. Spencer*, 101 Ill.

Where a father made and acknowledged a deed to his two minor children, but retained it until his death, and declined to have it recorded, on the express ground that he would thereby place the title beyond his power or control, and expressed an intention, after he had made and acknowledged the deed, to sell the land if he could get a certain price, and in pursuance of that intention did offer to sell the land, it was held that the deed was inoperative for want of a delivery: *Id.*

Deed Poll—Acceptance of—Liability of Grantee on Covenants.—A grantee who has accepted a deed poll, by the terms of which he "assumes and agrees to pay" a certain mortgage on the land "and save the grantor harmless therefrom," cannot, in an action upon his agreement, no fraud in the execution or delivery of the deed being suggested, show by oral evidence that he never agreed to assume and pay the mortgage, nor authorized nor knew of the insertion of such an agreement in the deed: *Muhlig v. Fiske*, 131 Mass.

DEVISE.

What passes a Fee—Limitation over upon Failure of Heirs.—A devise by a testator of all of his property of every description, whether real, personal or mixed, after paying all his just debts, is a devise of the fee, without the aid of a statute declaring such to be the effect of the devise: *Piutt v. Sinton*, 37 or 38 Ohio St.

Where there is a devise in fee, with a provision in the will that in case the devisee should die without leaving any legitimate heirs of her body, then the estate should go over to persons named, the fee taken by the first devisee is determinable only on the contingency of her dying without leaving such heirs living at the time of her death. *Niles v. Gray*, 12 Ohio St. 320, followed: *Id.*

DURESS.

Threat of Prosecution of Son.—A father may avoid a mortgage which he has been induced to sign by threats of the prosecution and imprisonment of his son: *Harris v. Carmody*, 131 Mass.

EASEMENT.

Interrupted Use.—An easement will not arise by prescription, where the facts show that the owner of the servient estate has habitually broken and interrupted the use whenever he thought proper to do so: *Kirschner v. West. & Atlantic Railroad*, 66 Geo.

Subterranean Right of Way—Construction of Entry across.—The general rules of law which govern the rights and obligations of the owners of dominant and servient estates, apply as well to subterranean rights of way as to those upon the surface: *Pomeroy v. Buckeye Salt Co.*, 37 or 38 Ohio St.

The owner of coal lands, through which another has a right of way by subterranean entry to reach coal mines in an adjoining tract, may lawfully construct an entry crossing such right of way, provided it be done without destroying or substantially interfering with the use thereof: *Id.*

EJECTMENT.

Mesne Profits—Voluntary Division of Profits between Contestants.—Where two parties each claimed an interest in land under a will, and with full knowledge of all the facts connected therewith, collected and voluntarily divided the rents and profits, in a subsequent action of ejectment by one against the other, he cannot recover such mesne profits: *White v. Rowland*, 66 Geo.

EQUITY. See *Set-off*

Judgment Lien—Want of Notice to Defendant—Actual Knowledge.—A court of equity will not decree a judgment lien to be invalid on the ground of the want of legal notice to the defendant, where the plaintiff has not been guilty of misconduct and the defendant had actual knowledge of the pendency of the action, unless a meritorious defence to the action be shown: *Gifford v. Morrison*, 37 or 38 Ohio St.

ERRORS AND APPEALS.

Admission of Improper Evidence—Equity—Presumption.—An error in admitting the evidence of an incompetent witness on the hearing of a chancery case, is no ground of reversal when the record contains other evidence which is competent and sufficient to sustain the decree: *Ritter v. Schenk*, 101 Ill.

In chancery cases it will be presumed that the court disregarded incompetent evidence on the hearing, especially where there is competent evidence on which to base its decree: *Id.*

Reduction of Damages on Appeal.—On error to reverse a judgment in damages, for a breach of contract, where a motion for a new trial based on the ground of an erroneous charge, and because the verdict is unsupported by the law and the evidence, is overruled, and the evidence is part of the record; and where it appears that the verdict is too large, by reason of error of the court in its rulings, or of the jury, and there is nothing necessarily implying passion or prejudice in the jury, the court may, where it can be done, ascertain from the evidence the amount of such excess, and may, on a remittitur of the same being entered, affirm the judgment as modified: *C. & M. Railroad Co. v. Himrod Furnace Co.*, 37 or 38 Ohio St.

EXECUTORS AND ADMINISTRATORS. See *Judicial Sale*.

Purchase by at Tax Sale.—An administrator of an estate, having no power or control over the land of his intestate, and not being required to pay the taxes thereon, may rightfully become the purchaser of the same, as against the heirs, at a sale for the taxes thereon, and set up his deed as color of title, under the Statute of Limitations: *Stark v. Brown*, 101 Ill.

FORMER RECOVERY.

Suit for Interest—When not a Bar to Suit for Principal.—Where a note is given, payable in one year, with interest payable semi-annually, and a suit brought two years thereafter to recover the instalments of interest then due, and a recovery therein, such judgment will be no bar to a subsequent action on the note to recover the principal. In such

case, the promise to pay interest is a distinct cause of action from the promise to pay the principal. Each promise constitutes a distinct cause of action : *Dulaney v. Payne*, 101 Ill.

FRAUDS, STATUTE OF.

Agreement to pay Lien on Vessel for Debt of former Owner.—If the owner of a vessel, subject to a lien for a debt incurred by a former owner, agrees to pay the lien, on the holder of the lien forbearing to enforce the same, this is not a promise to pay the debt of another, within the Statute of Frauds : *Fears v. Story*, 131 Mass.

INSURANCE.

Forfeiture—Non-payment of Premium Note—Omission of Notice—Usage—Parol Agreement in Contradiction of Policy.—If, in a policy of insurance, a forfeiture is provided for in case of non-payment of premium at the day specified, the courts cannot grant relief against it. The insurer may waive it, or by his conduct lose his right to enforce it; but that is all : *Thompson v. Knickerbocker Life Ins. Co.*, S. C. U. S., Oct. Term 1881.

While the taking of a note for the premium is a waiver of the primary condition of forfeiture for non-payment, yet, if there is also a condition by which the policy was to be void if the note was not paid, the non-payment of the note will work a forfeiture : *Id.*

A usage on the part of the company of giving notice of the falling due of premiums, is no excuse for non-payment upon a failure to receive such notice : *Id.*

A parol agreement, made at the time of issuing the policy, contradicting the terms of the policy itself is void, and cannot be set up to contradict the policy : *Id.*

A usage of the company not to demand punctual payment of the premiums, but to give days of grace, is a mere voluntary indulgence which cannot be construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to continue the indulgence : *Id.*

Even if such circumstances were sufficient to lay ground for relieving from the forfeiture, a subsequent tender of the premium is necessary, and a failure to make such a tender will defeat plaintiff's recovery : *Id.*

The payment of the annual premium is not a condition precedent to the continuance of the policy. It is a condition subsequent, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open to the insured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable grounds to infer that a forfeiture would not be exacted. But it must be just and reasonable ground, one on which the insured has a right to rely : *Id.*

INTEREST. See *Former Recovery*.

JUDICIAL SALE.

Executor's Sale—Caveat Emptor.—The doctrine of *caveat emptor* applies to an administrator's or executor's sale, and a purchaser thereat cannot repudiate his bid because of a defective title or want of title in the intestate, when there is no fraud or misrepresentation by the

administrator or executor. Nor will equity enjoin a resale at the purchaser's risk on his refusal to comply with his bid: *Jones v. Warnock*, 66 Geo.

LEGACY.

Gift to a Class—Who are included.—The general rule with regard to legacies to a class of persons is, that those only who are embraced in the class at the time the legacy takes effect will be allowed to take: *Jones's Appeal*, 48 Conn.

But where a legacy of that kind takes effect in point of right at one time, and in point of enjoyment at another, the general rule is that all those will take who are embraced in the class at the time the legacy takes effect in point of enjoyment: *Id.*

A testator gave certain property to his son for life, and after his death to his children equally. When the testator died the son had a wife fifty-nine years of age and three adult children, but the wife afterwards died and the son married again, and had two more children, who were living at his death. *Held*, that these children were entitled to share equally with the others in the property given by the will: *Id.*

LIBEL.

Statement by Counsel—When not Privileged.—A defamatory statement contained in the declaration in an action, signed by counsel, if not pertinent or material to the issue, is not privileged; and, in an action of libel against the counsel, he cannot justify by showing his belief that it was true, the sources of his information, or his instructions from his client: *McLaughlin v. Cowley*, 131 Mass.

MALICIOUS PROSECUTION.

Enforcement of Mortgage in violation of Agreement—Action for—Damages.—If a mortgage-creditor contract with his debtor not to enforce his mortgage within a given time, but subsequently does so, and levies on the property of the debtor, the latter has the right to sue for the actual injury occasioned him thereby, without alleging malice or want of probable cause: *Juchter v. Boehm*, 66 Geo.

A right of action exists in all cases of malicious abuse of legal process, or its use without probable cause. In such cases punitive damages may be added to the actual damage sustained: *Id.*

In an action for damages for the wrongful seizure and sale, under color of legal proceedings, of a tradesman's stock, while profits which he was making may not be recovered as such, yet their amount may be proved and considered by the jury as a fact in estimating the magnitude of the injury done: *Id.*

Generally, counsel fees do not form a part of the damages recoverable in action for tort, but if the defendant has acted in bad faith, or been stubbornly litigious, or caused the defendant unnecessary trouble and expense, they may be allowed by the jury, and may be proved for that purpose: *Id.*

MASTER AND SERVANT.

Term of Employment—Hiring by Year—When inferred.—Where one rendering service for another under a monthly employment, says to his employer that he desires to have his employment made more per-

manent, and thereupon a specified amount per year is agreed upon, payable in semi-monthly instalments, a hiring of a year may be inferred. Express words that the employment should continue for a year are not essential: *Bascom v. Strillito*, 37 or 38 Ohio St.

MINES. See *Easement*.

MORTGAGE. See *Duress*.

Neglect to Record—Postponement of in Favor of subsequent Lien.—The existence and common use of a public office for the recording of mortgages imposes a duty on a mortgagee to record his mortgage, and on a failure to do so he will be postponed to a subsequent *bona fide* mortgagee without notice, even though there be no statute requiring mortgages to be recorded: *Neslin v. Wells*, S. C. U. S., Oct. Term 1881.

Assumption of by Purchaser—Action by Mortgagee.—Where one purchases real estate encumbered by a mortgage, and agrees to pay the mortgage-debt as a part of the consideration, the promise may be enforced by the mortgagee. *Aliter* if the conveyance in which the promise is inserted is itself a mortgage: *Bassett v. Bradley*, 48 Conn.

MUNICIPAL BONDS. See *Constitutional Law*.

Authority to Execute under Seal—Omission of Seal—Validity.—A statute authorizing a town to subscribe to a railroad, provided, as follows: "It shall be lawful for the said commissioners to borrow on the faith and credit of the said town such sum of money as the tax-paying inhabitants shall fix upon by their assent in writing * * * and to execute bonds therefor under their hands and seal." *Held*, that the requirement of a seal was directory merely, and that the omission of a seal did not invalidate bonds issued under the act: *Draper v. Town of Springfield*, S. C. U. S., Oct. Term 1881.

MUNICIPAL CORPORATION.

Power to License Trades—Limited to those enumerated in the Statute.—Where the legislature, by the General Incorporation Act, declares that the corporate authorities of cities and villages organized and acting under its provisions shall have power to license certain occupations and kinds of business, specifically enumerating them, such declaration, by a familiar rule of construction, must be construed precisely as if the law, in express terms, inhibited the licensing of all trades and occupations not contained in the enumeration: *City of Cairo v. Cross*, 101 Ill.

NEGLIGENCE.

Injury by successive Negligent Acts of two Persons—Right of one paying Damages to recover from the other.—If a person leaves a hatchway in the sidewalk connected with his premises in an unsafe condition, so that an injury to a traveller on the street is liable to happen in consequence of it, and another person so interferes with the hatchway as to cause it to be more dangerous, and a traveller is injured by the hatchway, the occupant of the premises is *in pari delicto* with the other person, and cannot recover indemnity of him, if compelled to pay damages recovered in an action by the injured person: *Churchill v. Holt*, 131 Mass.

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PATENT.

Re-issue—Enlargement of Claim—When inadmissible—A claim can only be enlarged by a re-issue when an actual *bona fide* mistake has been inadvertently committed—such as a court of chancery would correct: *Miller v. The Bridgeport Brass Co.*, S. C. U. S., Oct. Term 1881.

In reference to such re-issues the rule of laches should be strictly applied, and no one should be relieved who has slept upon his rights and has thus led the public to rely on the implied disclaimer involved in the terms of the original patent. And when this is a matter apparent upon the face of the instrument, upon the mere comparison of the original patent with the re-issue, it is competent for the courts to decide whether the delay was unreasonable, and whether the re-issue was therefore invalid: *Id.*

Re-issue—When invalid—New Patent for same Invention—Process—Use by Government—Suit against Officer.—If a patent fully and clearly describes and claims a specific invention, complete in itself, a re-issue cannot be had for the purpose of expanding the claim to embrace an invention not specified in the original: *James v. Campbell*, S. C. U. S., Oct. Term 1881.

A patentee cannot claim in a patent the same thing claimed by him in a prior patent, nor what he omitted to claim in a prior patent in which the invention was described, he not having reserved the right to claim it in a separate patent and not having seasonably applied therefor: *Id.*

A patent for a machine cannot be re-issued for the purpose of claiming the process of operating that class of machines: *Id.*

The government of the United States has no right to use a patented invention without compensation to the owner of the patent: *Id.*

Query, whether an officer of the government can be sued for using an invention only for and in behalf of the government, and whether the Court of Claims is not the only tribunal in which the claim for compensation can be prosecuted: *Id.*

POSSESSION.

Record of Judgment in Action by Landlord against Tenant—Conclusiveness as to Tenant's Possession.—The record of a judgment in a summary process for the recovery of leased premises by A. against B., is conclusive evidence against B. and his grantees that he was in possession at the time as the tenant of A.: *Richmond v. Stahle*, 48 Conn.

And proof that he was in such possession up to the boundary line of the demised premises: *Id.*

RAILROAD. See *Receiver*.

RECEIVER.

Not liable to Suit without leave of Court—Power to Operate and Repair Railroad—Suit in Foreign State.—A receiver in possession of a railroad, and by order of the court engaged in the business of a common carrier thereon, cannot, without leave of the court, be sued for injury

to persons or property caused by his negligence or that of his servants : *Barton v. Barbour*, S. C. U. S., October Term 1881.

If the adjustment of the demand involve questions of fact, the court may, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, allow him to sue the receiver in a court of law or direct a feigned issue : *Id.*

A court of equity may authorize the receiver of a railroad to keep the same in repair and to operate it in the ordinary way until it can be sold to the best advantage of all interested : *Id.*

In such case, a court of another state has not jurisdiction without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the state in which he was appointed, and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect to such property : *Id.*

Certificates for Indebtedness of Railroad—Priority—Estoppel.—If the holder of railroad bonds secured by trust deeds on the road, having notice of the appointment of a receiver, and an order of court directing him on his petition to issue certificates of indebtedness on which to raise money to discharge a chattel mortgage on the personal property of the company, and to pay taxes, current expenses, &c., and making such certificates a prior and first lien on all the property of the company, desires to question the power of the court to make such order, he must do so before such certificates are issued and sold to *bona fide* purchasers, or paid out to creditors of the company. After their issue and sale, it will be too late for him, or purchasers from him with notice of the facts, to raise the question whether the subject-matter to which the certificates were applied was within the scope of the power of the court in the preservation of the property for the benefit of all concerned : *Humphreys v. Allen*, 101 Ill.

RECORDS. See *Mortgage*.

REPLEVIN. See *Shipping*.

SET-OFF.

Motion to set-off one Judgment against another—Attorneys' Fees protected.—A motion that one judgment be set-off against another is an appeal to the equitable powers of the court, to be granted or refused upon consideration of all the facts ; and in granting such motion, the claim of the attorneys for fees will be respected, wherever it appears to be right, in view of the facts, that this should be done : *Diehl v. Friester*, 37 or 38 Ohio St.

SHIPPING.

Replevin by Part Owner.—A part owner of a vessel cannot maintain replevin for his undivided part, although he owns a major interest in the vessel : *Hackett v. Potter*, 131 Mass.

SUBROGATION.

Purchaser from Heir without Administration—Payment of Debts out of the Proceeds.—If an heir, to whom lands descend subject to the debts

of his ancestor, sells the same with covenants of general warranty at private sale, without administration on his ancestor's estate, to a *bona fide* purchaser, who applies the purchase-money to discharge liens thereon created by the ancestor, and to the payment of preferred claims, such purchaser is in equity entitled, in the distribution of the purchase-money, to be subrogated to the rights and equities of the holders of such claims: *Sidener v. Hawes*, 37 or 38 Ohio St.

SURETY.

For Agent of Insurance Company—Omission of Company to Collect Balances due.—An agent of an insurance company gave a bond, with sureties, to the company, conditioned for the faithful performance of his duties as agent, according to the by-laws of the company. A by-law required that the agents of the company should render monthly accounts, and pay each month the balance due to the company. The agent rendered his accounts regularly: but, one month did not pay the whole balance due from him, and, thereafter, for more than a year his indebtedness to the company increased from month to month until it exceeded the penal sum in the bond, when, for the first time, the sureties were notified. *Held*, That these facts did not discharge the sureties: *Watertown Fire Ins. Co. v. Simmons*, 131 Mass.

Agreement with Principal to reduce Rate of Interest.—A memorandum made by the holder on the back of a promissory note, to the effect that the rate of interest after a certain day will be less than that stated in the body of the note, is not an alteration of the note, and does not discharge a surety of the maker, although written in pursuance of an agreement between the holder and the maker of the note without the knowledge of the surety: *Cambridge Savings Bank v. Hyde*, 131 Mass.

TAX.

Personal Judgment for Taxes—Effect upon the Lien.—The recovery of a personal judgment by the state, against the owner of real estate for taxes due thereon, does not discharge the lien given by the statute for such taxes, and hence is no bar to an application by the collector for judgment against the property. The state may have a personal judgment against the owner for the taxes, and at the same time, or at any other time, enforce payment against the land itself by a proceeding *in rem*; but the payment of either judgment will be a satisfaction of both: *People v. Stahl*, 101 Ill.

TRADEMARK.

Character of Word used—Injunction.—A trademark, to be protected from infringement, must designate the origin or ownership of the article to which it is applied. A mere general description by words in common use, of a kind of article or its nature and qualities, cannot of itself become a trademark: *Larrabee v. Lewis*, 66 Ga.

"Snowflake," as applied to bread or crackers, is a mere description of whiteness, lightness and purity: *Id.*

An arbitrary word, not descriptive of the character or quality of the article to be sold, may be used to designate particular goods, and may become a trademark: *Id.*

In Georgia, to have a word or words claimed as a trademark pro-

tected by injunction from use by another, it should appear that the defendant's use of them was with the intent to deceive or mislead the public: *Id.*

TRUST.

Conveyance for use of Wife and Children—Power of Sale—Bona fide Purchaser.—Where a deed conveyed land to the wife of the grantor for her use for life, provided that it should be used by the grantor's children together with his wife as a home, and at her death be divided among them, and with power in the wife "at any time in her discretion to sell and convey the said property by deed, provided the proceeds of such sale are invested in other real estate for the uses expressed," a *bona fide* purchaser from the wife would acquire a good title, and would not be bound to see to the application of the proceeds: *Guill v. Northern*, 66 Geo.

Use of Trust Funds by Trustee—Compound Interest.—Where a trustee refuses to account for the profits arising from his use of the money, or has so mingled it with his own that he cannot separate and account for the profits that belong to the *cestui que trust*, the latter is allowed compound interest. This rule applies especially to cases involving a wilful breach of duty: *State v. Howarth*, 48 Conn.

UNITED STATES. See *Patent*.

WILL.

Failure to establish Will after Caveat—Costs against Propounder—Liability of Legatees.—Where a will is propounded and *caveat* is filed, upon failure to establish the will, the court cannot go further than to enter up judgment for costs against the propounder. Though parties beneficially interested as legatees may have aided the propounder by employing counsel and subpoenaing witnesses, they are not such parties to the record as that a judgment for costs can be entered against them: *Frances v. Holbrook*, 66 Geo.

Whether one who propounds a will at the instance or for the benefit of another can recover from the latter by *assumpsit* the costs which he had incurred by failing to establish the will, *Quære?* *Id.*

Destruction of—Evidence as to Contents—Sanity.—Where a will duly executed and attested was destroyed, with the connivance of a part of the heirs of the testator, and no copy appeared to be in existence, in a suit by a devisee not a party to such destruction, it was *held*, that the latter was only required to show, in general terms, the disposition which the testator made of his property by the instrument, and that it purported to be his will, and was duly attested by the requisite number of witnesses: *Anderson v. Irwin*, 101 Ill.

On a bill to establish a will destroyed after the testator's death, proof of the sanity of the testator is not indispensable in the absence of any proof that he was not in his sound mind, and in such case the disposition made by him of his property may of itself afford sufficient evidence of his sanity: *Id.*

Seemle, that if a will be *bona fide* presented for probate and not fraudulently pressed, and upon *caveat* the same is rejected, the costs should fall upon the estate: *Id.*

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MAY 1882.

THE ACTION FOR THE MALICIOUS PROSECUTION OF A CIVIL SUIT.

- I. INTRODUCTION.
- II. RESTRAINTS ON VEXATIOUS LITIGATION IN ENGLAND.
- III. THE ACTION FOR MALICIOUSLY PROSECUTING A CIVIL SUIT.
VIEWS OF THE OLD JUDGES.
- IV. THE PRINCIPLE FOLLOWED IN LATE YEARS.
- V. OPINIONS OF THE AMERICAN TEXT WRITERS.
- VI. THE AMERICAN ADJUDICATIONS. THE ACTION NOT SUSTAINED.
- VII. THE AMERICAN ADJUDICATIONS. THE ACTION SUSTAINED.
- VIII. CONCLUSION.

I. *Introduction.*—Actions for the malicious prosecution of persons on criminal charges are familiar to both judges and lawyers. To put the criminal law in force, maliciously and without probable cause, is a wrongful act, and he who is thereby injured in person, property or reputation, may obtain satisfaction from his injurer before a civil tribunal. The courts offer to the vindictive and malevolent an easy yet terrible engine with which to carry out the promptings of their malice. While within their precincts the accused is not to be regarded as guilty until proved so, yet outside their walls the rule is different, and to be charged with a crime, so far as the reputation is concerned, is almost as bad as to be convicted of it. Therefore to charge a citizen with the commission of a criminal act, and to do so groundlessly and mali-

ciously, is a grievous wrong; therefore the reports teem with cases in which persons unjustly accused have successfully appealed to the courts for damages against their traducers. Other instances of oppression through the aid of the law, less frequent but equally clear, present themselves. The maliciously attempting to have one adjudicated a bankrupt (*Farley v. Dunks*, 4 El. & Bl. 499), or adjudged a lunatic (*Lockenour v. Sides*, 57 Ind. 360), maliciously arresting another in a civil action (*Stone v. Swift*, 4 Pick. 389; *Hayden v. Shed*, 11 Mass. 500), falsely suing out an attachment against a person's property (*Fortman v. Rottier*, 8 Ohio St. 548), or maliciously issuing execution for a larger sum than is due (*Churchill v. Siggers*, 3 El. & Bl. 938), are examples of legal damage resulting from the wrongful exercise of legal remedies other than criminal. In four of the five cases above instanced, there is no deprivation of the plaintiff's liberty, and even in the fifth the proceeding is in no sense in the nature of a prosecution for a crime. It is thus evident that to sustain an action for a malicious prosecution, it is not essential that the proceeding which is complained of should have been a criminal one, or that the plaintiff should have been imprisoned. In the malicious attempts to adjudicate him a bankrupt or adjudge him a lunatic, his damage lies in the injury to his reputation, and the expense to which he has been put in resisting the proceedings; in the malicious attachment of his person, there is little or no injury to the reputation, but there may have been much expense in procuring bail, and in the two last cases the damages sustained are principally his costs in seeking advice and obtaining bondsmen.

Nevertheless, in all the cases above mentioned, the defendant suffers damage in his property over and above the ordinary costs of resisting a civil action; and the question, will an action lie for maliciously and vexatiously prosecuting a civil suit against another where no special damage is incurred, presents itself for our consideration.

II. *Restraints on vexatious litigation in England.*—It has long been a leading principle of the English law to accord to every man the utmost liberty of bringing his grievances before the tribunals of his country; "a man shall not be punished for suing on writs in the king's courts, whether he have right or wrong:" Fitzherbert's Nat. Brev. 429. But though the right to

sue is encouraged and not restricted, appliances for the suppression of vexatious and unfounded litigations have existed in the English courts from early times. Prior to the reign of Henry III. no person could maintain a civil action without having two or more persons as pledges of prosecution; and if judgment were given against the plaintiff, or if he deserted his suit, both he and his pledges were amerced to the king. A failure to find pledges was a sufficient ground for reversing a judgment on a writ of error. But this system at length fell into abuse, partly from the fact that, as they went to the king the injured party himself received no benefit from the amercements, and partly because it was abused by plaintiffs supplying, as pledges, persons of mean estate, or even imaginary persons: *Hussey v. Moore*, 3 Bulstr. 275; Law Magazine and Review, September 1876. Then about the middle of the thirteenth century, Parliament decreed that the successful party should in all cases receive his costs, which principle obtains in the English courts to this day.

III. *The action for maliciously prosecuting a civil suit.—Views of the old judges.*—And so, because the defendant was considered to be sufficiently recompensed, and the plaintiff sufficiently punished, by respectively receiving and paying the costs of the unfounded suit, the old cases and the early text writers all concur in denying the right to a civil action in addition. Thus, in Bacon's Abridgment, tit. *Action on the Case* (H), p. 141, it is said: "But it must be observed that there is a great difference between a false and malicious prosecution by way of indictment and bringing a civil action; for in the latter the plaintiff asserts a right and shall be amerced *pro falso clamore*; also, the defendant is entitled to his costs; and, therefore, for commencing such an action, though without sufficient cause, no action on the case lies." In Buller's *Nisi Prius*, p. 11, it is said: "In general it is not actionable to bring a civil action, though there be no good ground for it, because it is a claim of right, and the plaintiff finds pledge to prosecute, and is amerciable *pro falso clamore*, and is liable to costs." *Waterer v. Freeman*, Hobart 205, 206, arose in 1640. It was an action for wrongfully suing out double executions against the plaintiff's property, whereby he was twice charged. The action was sustained, HOBART, C. J., in the course of his judgment, saying: "If a man sue me in a proper court, yet, if his suit be utterly without ground of truth, and that certainly known

to himself, I may have an action of the case against him for the *undue vexation and damage* that he putteth me unto by his ill practice, though the suit itself be legal, and I cannot complain of it as it is a suit." Fifty years later we find another case meagerly reported, and far from clear (*Temple v. Killingworth*, 12 Mod. 4 (1691), the whole report being embraced in the two sentences of the judgment of HOLT, C. J.: "Of late it is held that case will lie for *prosecution* in an inferior court where that court has not the jurisdiction. The first case in point was at Huntingdon assizes, and referred to the Common Pleas, and there adjudged that to sue a man, without any cause of action at all, no action lies, unless it appears to be with a malicious and vexatious design." But from a report of the same case in Shower's Reports 158, it appears that the plaintiff had been arrested; and it is to be observed that in the latter report no mention is made by Lord HOLT of the case at the Huntingdon assizes, neither is it in Carthew 189, where *Temple v. Killingworth* is also reported. *Savill v. Roberts*, 12 Mod. 208, decided in the King's Bench in 1698, is a much cited case in this connection. The defendant had indicted the plaintiff for riot; the latter was acquitted, whereupon he brought an action for damages to his name and property, which was sustained. HOLT, C. J., who delivered the judgment of the court, replied to the defendant's argument that no man should be responsible for any damages for suing a writ or prosecuting in the king's courts. "It is to be considered," said he, "first, that there is a great difference between bringing an action maliciously, and prosecuting an indictment maliciously; and secondly, that the notion that no action doth lie for bringing an action maliciously is not to be taken largely and universally but with some restrictions; for, first, if a man brings an action, he either claims a right or complains of an injury, and the law always allows him to take his course of law to obtain his right or be satisfied for his injury, and this is allowed in all courts. * * * The law hath provided that no man should prosecute without finding pledges, and that was a security against troublesome actions; then if the plaintiff's suit be vexatious and groundless, he shall be amerced *pro falso clamore*, and though these amercements be now matters of form, and therefore several Acts of Parliament have given costs to defendants, yet, we must judge by the reason of the law as it stood anciently; but in case of an indictment, there is no provision or remedy, but

by bringing an action; but if it appears that the action is brought merely for vexation and oppression, the party grieved, *in some cases*, shall have action on the case; he shall not, indeed, say generally, that he falsely and maliciously, without probable cause, did bring an action, &c., but if he show any special matter whereby it appears to the court that it was frivolous and vexatious, he shall have an action, as in the case of *Daw v. Swaine*, 1 Sid. 424." In *Parker v. Langley*, Gilbert's Cas. 163, decided in 1714, PARKER, C. J., said: "The applying in a civil action to a court of justice for satisfaction or redress has been so much favored, that no action has ever been allowed against a plaintiff for such suit singly and directly on pretence of its being false and malicious. * * * An action upon the case has not yet succeeded (whatever in special cases they must do), but only where the plaintiff in the first suit made the course of the court, requiring special bail, a pretence for detaining another in prison, and where the malice was so specially charged that it appeared that the end of the arrest was not the expectation of benefit to himself by a recovery, but a design of imprisoning the other." In 1766, Lord CAMDEN said that there were no cases to be found in the old books of actions for suing where the plaintiff had no cause of action, but that "of late years when a man is maliciously held to bail where nothing is owing, or where he is maliciously arrested for a great deal more than is due, this action has been held to lie because the costs in the cause are not a sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due:" *Goslin v. Wilcock*, 2 Wils. 305 (1766).

IV. *The principle followed in late years.*—The modern English decisions reiterate the conclusions of the older cases without dissent. In the year 1851, while arguing a case before the full bench of the Common Pleas, the plaintiff's counsel asked: "Actions for malicious prosecution of criminal charges are of frequent occurrence—upon what principle is it that that sort of action is maintainable? Because the process of the queen's court is made use of for the purpose of oppression. What difference is there in this respect between process of a criminal and process of a civil court?" To this JERVIS, C. J., replied: "Where an action is wrongfully brought, the costs which the party gets are a compensation for the wrong; but in criminal proceedings there are no costs." The counsel then cited from Fitzherbert's *Natura*

Brevium, 116 *b*, where it is said that "if men say and affirm unto A. that he hath right unto such land and procure and cause him to sue an action for the same against B., who is tenant of that land, &c., by which he is of necessity compelled to sell other lands or tenements for the defence of his land, &c., now he shall have an action against those who procure or conspire to cause A. to bring his action." But WILLIAMS, J., answered: "That may be, though it is not so put, on the ground that no costs were recoverable in a real action:" *Cotterell v. Jones*, 11 C. B. 715 (1851). In this case the action was against two persons for conspiring together maliciously and vexatiously to commence an unfounded action against the plaintiff in the name of a third, a pauper, and in pursuance thereof so commencing and prosecuting it, whereby, although the pauper was nonsuited, the plaintiff was unable to obtain his costs against him. The plaintiff had a verdict for the amount of the costs incurred by him in the former action, but on appeal the judgment was set aside on a question of pleading, the court holding that the declaration did not show a cause of action, because it did not allege that on the nonsuit the costs had been awarded by the court against the pauper. Nevertheless the language of the judges must be noticed in examining our subject. "It is conceded," said JERVIS, C. J., "that if the party so wrongfully put forward as plaintiff in the former action had been a person in solvent circumstances, this action could not have been maintained, inasmuch as the award of costs to the defendant (the now plaintiff) upon the failure of that action, would in contemplation of law, have been a full compensation to him for the unjust vexation, and consequently he would have sustained no damage." MAULE, J., said: "It is conceded that this action could not be maintained in respect of extra costs, that is, *costs ultra, the costs given by statute to a successful defendant.*" And TALFOURD, J., added: "It appears from the whole current of authorities that an action of this description, if maintainable at all, is only maintainable in respect of legal damage actually sustained; and that the mere expenditure of money by the plaintiff in the defence of the action brought against him does not constitute such legal damage; but that the only measure of damage is the costs ascertained by the usual course of law. There being no averment in this declaration that any such costs were incurred or awarded, no legal ground is disclosed for the maintenance of the action."

Purton v. Honnor, 1 Bos. & Pul. 205 (1798), was an action on the case to recover damages sustained by the plaintiff in defending a vexatious ejectment suit brought against him by the defendant in which the nominal plaintiff had been *non prossed*. There was a general demurrer to the declaration and joinder. The case came on before the Common Pleas on a day set for the purpose of hearing the plaintiff's counsel in support of the declaration, but the court expressing themselves as being clearly of opinion on the authority of *Seville v. Roberts*, *supra*, that such an action was not maintainable, he declined arguing the point, and the court gave judgment for the defendant.

V. *Opinions of the American text writers.*—In Swift's Digest published in 1849, Dutton & Cowdry's ed., p. 492, it is said: "It is well settled that at common law no action will lie against one for bringing a civil suit, however malicious and unfounded, unless the body of the party is imprisoned or holden to bail. In all other cases the costs the party recovers is supposed to be an adequate compensation for the damage which he sustains. Of course where the process is by summons only, there can be no action for a malicious suit; it can only lie in cases where the process is by attachment, for there no cost is allowed which can be a compensation for the personal injury. Whenever one person causes another to be arrested or attached and holden to bail, or imprisoned, where there is no debt due, or for a greater sum than is due, with a malicious intent to injure and oppress him, action will lie." The editors of the American Leading Cases, vol. 1, p. 261, in their note to *Munns v. Dupont*, 3 Wash. C. Ct. 31 (1811), unqualifiedly lay it down that the action of malicious prosecution will not lie for the mere institution of a civil suit in a court of competent jurisdiction, where the person is not arrested or held to bail, or his property attached, or other grievance occasioned, because the costs are considered a sufficient compensation. The cases, they say, where the general principle has been asserted that an action will lie for any civil suit maliciously and groundlessly instituted, were not cases of malicious prosecution but of malicious abuse of the process of law; and further on, the cases in which an action for malicious abuse of process is sustainable are stated to be five, viz.: where a *capias* is sued out for some collateral object of oppression; where a second *capias* is issued from vexatious

motives; where a *ca. sa.* is sued out irregularly, a *fi. fa.* being still out; where, under a *fi. fa.* on a judgment on a bond with penalty, the plaintiff directs goods to be levied on and sold to the amount of the penalty, or in double the amount of the debt due on it; and where the defendant is arrested on a *ca. sa.* for a larger sum than is due. The case of an ordinary suit without these collateral or extraordinary features, is not included in this category. In Weeks's *Damnum Absque Injuria*, sect. 70, it is said: "If a person prosecutes a civil action against another maliciously, and without reasonable and probable cause, no action for damages can usually be supported against the prosecutor. A man may, if he fancies he has a civil action against another, prosecute his claim, however false or unfounded it may be. The rules governing malicious prosecutions in the criminal courts do not apply. It cannot, however, be denied that in cases of extremely vexatious suits, where special damage has been actually suffered, alleged and shown, the action has been allowed." In Cooley on Torts, p. 189, it is said: "If every suit may be retried on an allegation of malice the evils would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first." Mr. Townshend, in his essay on Malicious Prosecution (Townshend on Slander and Libel, sect. 410), says: "Ordinarily a civil action involves the defendant merely in the costs of his defence, and in civil actions, with rare exceptions, the award of costs to the defendant is the only penalty to which the plaintiff is subjected for having made an unfounded complaint. But where in a civil action the defendant is held to bail or imprisoned, he has, under certain circumstances, a remedy by action, and such an action is usually denominated an action for malicious prosecution. Without insisting that this is improper, we exclude such actions from our consideration, and confine ourselves exclusively to the action for making a criminal charge maliciously and without reasonable and probable cause." In the American edition of Addison on Torts, sect. 863, it is said: "If one man prosecutes a civil action against another maliciously and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action. There is a great difference between the bringing of an action and indicting maliciously and without cause. Where a man brings an action he claims a right to himself or complains of an injury done to him; and if a man fancies he has a cause of action he may sue and put

forward his claim, however false and unfounded it may be. The common law, in order to hinder malicious and frivolous and vexatious suits, provided that every plaintiff should find pledges which were amerced if the claim were false. But that method became disused, and then to supply it the statutes gave costs to the successful defendants. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action. But if A. sues an action against B. for mere vexation, in some cases, upon particular damage, B. may have an action, but it is not enough to say that A. sued him *false et malitrose*, but he must show the matter of the grievance specially, so that it may appear to the court to be manifestly malicious." In Hilliard on Torts, p. 422, it is said: "It has been sometimes held that an action for a malicious prosecution will not lie for bringing a *civil suit*, although it were groundless. * * * The explanation of this difference between criminal prosecutions and civil actions is found in part in the fact that the common law in order to hinder malicious, frivolous and vexatious suits, provided that every plaintiff should find pledges which were amerced if the claim was false. And after this practice ceased statutes provided costs for a prevailing defendant. But the qualified doctrine is now well settled in relation to civil actions, corresponding with the rule as to criminal prosecutions, that no action lies to recover damages sustained by being sued in a civil action, unless it was malicious and without probable cause: *Baugh v. Killingworth*, 4 Mod. 14 (1690); *White v. Dingley*, 4 Mass. 433 (1808); *Cox v. Taylor*, 10 B. Mon. 17 (1849); *Wengert v. Beashore*, 1 Penn. St. 232 (1830); *Herman v. Brookerhoof*, 8 Watts 240 (1839); *Jamison v. McIntosh*, 12 La. Ann. 785 (1857); *Besson v. Southard*, 10 N. Y. 236 (1851). Of the cases cited by Mr. Hilliard not a single one sustains the proposition that an ordinary civil suit, where there has been no arrest of the person or no taking of property out of the possession or disposal of the defendant by attachment or injunction, may become the subject of another action if prosecuted maliciously and without probable cause. In *Baugh v. Killingworth*, *Wengert v. Beashore*, *Herman v. Brookerhoof* and *Besson v. Southard*, the plaintiff had been arrested by the defendant under a *capias* in the former suit. *White v. Dingley* involved no different principle. The creditors of White had by deed covenanted with him that they would not sue or arrest him for any demands due by him to them

for the space of two years, the deed further providing that if any creditor should bring suit, &c., in violation of the agreement, the said White should be wholly discharged as to all claims held by the creditor or creditors so suing. Dingley, a creditor, who had signed the agreement, sued the plaintiff before the two years had expired, and in default of bail he was committed to prison. It was held that he was not entitled to an action in addition to the discharge from the debt which he owed; that the forfeiture of the debt was in the nature of liquidated damages. It is true that the chief justice, in concluding his opinion, remarked: "No action by the common law lies for damages sustained by suing a civil action when the plaintiff fails, unless it be alleged and shown to be malicious and without probable cause." But as the case which he was deciding grew out of both a suit and an arrest, it cannot be presumed that he was referring to an action in which but one of these was present. In *Cox v. Taylor* the plaintiff had sued out an injunction under which the plaintiff had been kept out of the use of his land for upwards of twelve years; and in *Jamison v. McIntosh*, also, the complaint was the wrongful suing out of an injunction.

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(To be continued.) / 353

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

CHARLES I. BONAPARTE, EXECUTOR OF ELIZABETH PATTERSON,
PLAINTIFF IN ERROR, v. THE APPEAL TAX COURT OF BALTI-
MORE CITY, DEFENDANT IN ERROR.

The registered public debt of one state, or of a city, town or county in such state, though exempted from taxation under the laws of said state, or actually taxed in such state, are taxable by another state, when actually owned by a resident of the latter state.

IN error to the Court of Appeals of Maryland.

The following registered evidences of debt, belonging to the testatrix of the plaintiff in error, were valued to her in 1876, in her lifetime, in the city of Baltimore, where she resided, under the laws of Maryland: \$105,000 City of New York 6 per cent. stock; \$15,000 City of New York 7 per cent. stock; \$10,000 County of

New York 7 per cent. stock ; \$50,000 State of Pennsylvania 6 per cent. stock, which was exempted from taxation by the law authorizing its issue ; \$116,000 City of Philadelphia 6 per cent. stock, part of which was exempted from all taxes under the laws of Pennsylvania ; and \$86,000 state of Ohio 6 per cent. stock. The interest on most of these evidences of debt was payable in the respective states under whose laws the debts were credited ; and the securities were transferable only in person, or by power of attorney, at appointed places in the respective states in which the evidences of debt were issued.

The testatrix of the plaintiff in error filed her petition in Baltimore City Court, praying that these securities might be stricken from the list of her taxable properties on the ground that being bonds of other states and of cities in other states, they were not properties within the taxing jurisdiction of Maryland, under the ruling of the Supreme Court in the *Foreign Held Bond Case*, 15 Wall. 324. A *pro forma* judgment having been entered in her favor, the Appeal Tax Court of Baltimore City appealed. The Court of Appeals of Maryland reversed the *pro forma* judgment of Baltimore City Court, and decided (50 Md. 534), that these properties were rightfully valued to the testatrix of the plaintiff in error in the city of Baltimore, her place of residence, and were there taxable. She took the case by writ of error to the Supreme Court of the United States.

The opinion of that court was delivered by

WAITE, C. J.—The question we are asked to decide in this case is whether the registered public debt of one state, exempt from taxation by the debtor state, or actually taxed there, is taxable by another state when owned by a resident of the latter state. We know of no provision of the Constitution of the United States which prohibits such taxation. It is conceded that no obligation of the contract of the debtor state is impaired. The only agreement as to taxation was that the debt should not be taxed by the state which created it.

It is insisted, however, that the immunity asked for arises from art. 4, sect. 1, of the Constitution, which provides that full faith and credit shall be given in each state to the public acts of every other state. We are unable to give such an effect to this provision. No state can legislate except with reference to its own jurisdiction. One state cannot exempt property from taxation in another. Each

state is independent of all the others in this particular. We are referred to no statute of the debtor state which attempts to separate the *situs* of the debt from the person of the owner, even if that is within the scope of the legislative power of the state. The debt was registered, but that did not prevent it from following the person of its owner. The debt still remained a chose in action, with all the incidents which pertain to that species of property. It was "movable" like other debts and had none of the attributes of "immovability." The owner may be compelled to go to the debtor state to get what is owing to him, but that does not affect his citizenship or his domicile. The debtor state is in no respect his sovereign, neither has it any of the attributes of sovereignty as to the debt it owes, except such as belong to it as a debtor. All the obligations which rest on the holder of the debt as a resident of the state in which he dwells still remain, and as a member of society he must contribute his just share towards supporting the government whose protection he claims and to whose control he has submitted himself.

It is true, if a state could protect its securities from taxation everywhere, it might succeed in borrowing money at reduced interest; but inasmuch as it cannot secure such exemption outside of its own jurisdiction, it is compelled to go into the market as a borrower, subject to the same disabilities in this particular as individuals. While the Constitution of the United States might have been so framed as to afford relief against such a disability, it has not been, and the states are left free to extend the comity which is sought, or not, as they please.

Taxation of the debt within the debtor state does not change the legal *situs* of the debt for any other purpose than that of the tax which is imposed. Neither does exemption from taxation.

The judgment is affirmed.

There never was any doubt that immovable properties in a state, or properties permanently located in a state, were subject to the *lex rei sitæ*, and were, therefore, taxable by such state: 2 Domat's Civil Law by Strahan, 2d ed., p. 330, sect. 7; *Freke v. Lord Carbery*, 16 Eq. Cases 466, 467. "Movables, devoted to a purpose which binds them as fixtures in a particular place," are not exceptions to this rule: Savigny on Conf. of Laws, by Guthrie,

2d ed., London, 1880, p. 180; for such properties form parts of the proper wealth of the state in which they are fixtures, and are subject to the *lex rei sitæ*: *Green v. Van Buskirk*, 7 Wall. 150. But it may certainly be insisted that, in the United States and in England, it is a settled rule of public law, that all *movable* properties belonging to a resident of a state, which are not so located in another state as to form part of its proper wealth, have no other *situs*

than the domicile of their owner: *Tappan v. Merchants' Nat. Bank*, 19 Wall. 499; *Hoyt v. Sprague*, 103 U. S. 630, 631; *Sill v. Worswick*, 1 H. Bl. 690; *In re Ewin*, 1 Cr. & J. 155; *Birtwhistle v. Vardill*, 2 Cl. & F. 575; *Thomson v. Adv. General*, 12 Id. 17, 20; *In re Cigala's Settlement*, L. R., 7 Ch. Div. 356, 357; Story on Conf. of Laws, 7th ed., sects. 379-381; 3 Burge on Col. and For. Law 749-751; 4 Phill. on International Law 37. Savigny admits that this is the American, English and French doctrine: Savigny on Conf. of Laws, by Guthrie, London, 1880, 2d ed. 138.

The debts due by a private corporation, created in one state to a citizen of another state, are the property of the person to whom they are due: 1 Bell's Comm., 6th ed., 510. Such debts can have no *situs* separate from the domicile of the creditor: Story on Conf. of Laws, 7th ed., sects. 362, 362 a, 399; *Thompson v. Adv. General*, 12 Cl. & F. 17. They can be taxed in his hands only: *Railroad Co. v. Jackson*, 7 Wall. 267; *State Tax on Foreign Held Bonds*, 15 Id. 320; *Murray v. Charleston*, 96 U. S. 445; *Kirtland v. Hotchkiss*, 100 Id. 498, 499. The *situs* of such debts is not separated from the domicile of their owner by any form of security, applicable to such debts, which may have been given to the creditor or created for his benefit: *Kirtland v. Hotchkiss*, 100 U. S. 491, 492; nor by the fact that such debts are made payable in the state in which the obligations were created, and not at the domicile of the creditor: *Kirtland v. Hotchkiss*, *supra*; nor by any obligation which may exist to make formal transfer of them in a particular manner, or at a particular place; or by the fact that the registry of such assignments is required to be made or kept in a particular place: *United States v. Cutts*, 1 Summ. 143-149; *Black v. Zacharie*, 3 How. 513; *Dewing v. Perdicaries*, 96 U. S. 196; *Johnston v. Laytin*,

103 Id. 804; *Baltimore City Pass. Ry. Co. v. Sewell*, 35 Md. 238; *Angell & Ames on Corp.*, 8th ed., sect. 354; *Thomson v. Adv. General*, 12 Cl. & F. 17; *In re Cigala's Settlement*, L. R., 7 Ch. Div. 356, 357.

The debts due by states, counties and cities are not exceptions to the rule applicable to debts due by private corporations. When states have created debts for constitutional purposes, and contracted to repay them with interest, or when municipal organizations, acting under sufficient authority, have created debts for such purposes, and have contracted to repay them with interest, they have not exercised any sovereign powers: *U. S. Bank v. Planters' Bank*, 9 Wheat. 907; *Murray v. Charleston*, 96 U. S. 445. They have exercised the ordinary corporate power of borrowing money, in the open market, upon terms agreed upon between them and those who loaned such money. The obligations which they have given for the payment of the interest and principal of the debts thus created to any lender resident in the state or municipality which has borrowed such money, are properties in the hands of such resident, which the particular state or municipality may tax as part of his wealth: *Murray v. Charleston*, *supra*; *In re Cigala's Settlement*, L. R., 7 Ch. Div. 357. Such state or municipality cannot provide by legislation for collecting any tax, which it may impose on such property, by withholding from the creditor part of the interest or principal which it had stipulated to pay him; because such legislation or method of collection would impair the obligation of its contract, which was to pay to the creditor the interest and principal *in solido*: *Murray v. Charleston*, *supra*. But it may, while leaving the obligation of its contract wholly untouched, direct that the property which it has thus created should be valued by some sufficient standard, as the property of any holder residing in

the state or municipality creating the debt, and may subject it, in common with other similar property owned by residents of such state or municipality, to such taxes as it may be authorized to impose for the support of its government. A state or municipality can exercise this power in such case, because a debt due to a person living within its boundaries, follows the person of the creditor, and such creditor is a resident within its territorial limits: *Railroad Co. v. Jackson*, 7 Wall. 267; *State Tax on Foreign Held Bonds*, 15 Id. 320; *Murray v. Charleston*, 96 U. S. 445; *Kirtland v. Hotchkiss*, 100 Id. 498, 499; *Hoyt v. Sprague*, 103 Id. 630; *In re Ewin*, 1 Cr. & J. 155; *Thomson v. Adv. General*, 12 Cl. & F. 17, 20; *In re Cigala's Settlement*, L. R., 7 Ch. Div. 357; 1 Jarman on Wills (Randolph & Talcott) 4. But, if the creditor is not a resident of the state or municipal corporation, exercising the taxing power, then such state or municipality cannot direct such property to be valued to the creditor or subject it to taxation; because the particular property follows the person of the creditor, and such creditor is not subject to the jurisdiction of the indebted state or municipality. See cases last cited.

Where then can such property, so owned, be taxed?

"For all national purposes, embraced by the Federal Constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In other respects, the states are necessarily foreign to and independent of each other:" *Buckner v. Finley & Van Lear*, 2 Pet. 590; *Dickins v. Beal*, 10 Id. 579; *Bank of United States v. Daniel*, 12 Id. 53; and may tax all persons within their respective jurisdictions, and all property belonging to such persons within such respective jurisdictions, which is not expressly or by necessary implication, withdrawn from their tax-

ing power by the Constitution of the United States: *Tappan v. Merch. Nat. Bank*, 19 Wall. 499; *City of New York v. Miln*, 11 Pet. 138; *Transportation Co. v. Wheeling*, 99 U. S. 279, 281, 282; *Hoyt v. Sprague*, 103 Id. 630. The states, though foreign and independent of each other in the administration of their domestic affairs, have been brought into the closest possible connection by that provision of the Federal Constitution, which declares that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states: Const. U. S., art. 4, sect. 2. Whatever may be the precise scope of this provision (*McCready v. Virginia*, 94 U. S. 395), it cannot be doubted that it confers upon every citizen of each state the right to acquire property in every other state, and imposes on him the obligation to hold such property, if it remains permanently within the jurisdiction of the state, in which it was acquired, subject to the taxing jurisdiction of such state; but if it does not remain within such jurisdiction, but follows the person of its owner, to hold it subject to the taxing jurisdiction of the state of which he is a citizen. If, therefore, the creditor of a particular state or municipal organization, who does not reside within the territory of the indebted community, cannot be taxed by it, because the debt due to him, which he had the constitutional right to acquire, is property, which follows his person, and he is a resident of another state, surely the state of which he is a resident can direct that such property, so owned, shall be valued to him, and be taxed as a part of his wealth in the state of which he is a resident. If the state of which such person is a resident cannot tax such property as a portion of his wealth, no other state can tax it. The owner of such property is not within the jurisdiction of any other state, and the property which he owns has no *situs*

in any other state. It would follow, therefore, that if the state in which the holders of the obligations of other states and of municipalities in other states reside, cannot tax such properties, they are, in effect, exempted from taxation, except when they are held by a resident of the state by whose laws the issue of such obligations was authorized. Such a conclusion certainly could not be properly sanctioned. It serves no purpose to say that the imposition of such a tax upon the bonds of other states, owned by residents of the taxing state, impairs the borrowing powers of the states which issued the obligations in such taxing state. To this it would be sufficient to reply, that the right of any state to create a movable property, exempted from taxation, even when it formed part of the wealth of other states, would yet more seriously impair the taxing powers of other states. A state which taxes the bonds of other states or of municipalities, created by other states, when such bonds are owned by a resident of the taxing state, impairs no power which the indebted states or municipalities may exercise within their respective territorial limits. It exercises only the undeniable and unlimited jurisdiction which it possesses over all persons and things within its own territorial limits in a case in which such jurisdiction has not been abridged by the Constitution of the United States: *City of New York v. Milne*, *supra*; *Transportation Co. v. Wheeling*, 99 U. S. 281, 283; Const. U. S., 10th Amendment. Every state has a right to repair, as far as it can, the loss of taxable wealth, caused by the withdrawal from its own territories of capital belonging to a resident, by the taxation of the property which such resident has brought within its limits in exchange for the capital with which he has parted. If any possible loss occurs to an indebted state because of the exercise of the taxing power of another state over its bonds, when the

property of a resident of the taxing state, it is certainly *damnum absque injuria*. It is the exercise of a right by the taxing state, which causes no more detriment than is necessarily the result of an artificial form of government and of conflicting public interests: *Cooley on Torts* 81; *Weeks on Dam. Abs. Inj.* 16; *Sedgwick on Meas. of Dam.*, 6th ed., 28; *Potter v. Brown*, 5 East 131. Bonds issued by the United States have their *situs* at the residence of their owner, but they are, of course, excepted from the taxing power of any state. Although the government of the United States is possessed of limited powers, it has supreme authority so far as its sovereignty extends: *Tennessee v. Davis*, 100 U. S. 263; *Rhode Island v. Massachusetts*, 12 Pet. 729. No state can interfere with the operation of these powers, or impose the smallest restraint upon their use: *Transportation Co. v. Wheeling*, *supra*; *Tennessee v. Davis*, *supra*. The United States is empowered by the federal Constitution to borrow money for the prescribed uses of the government, and may issue its bonds as evidences of its indebtedness, showing the terms upon which the particular debts were contracted. As the federal government is supreme in the powers which it possesses, it is not, of course, subject, in any particular, to the powers of state governments. A state, therefore, cannot tax the money which the federal government has borrowed, and for which it has given its bonds, though such borrowed money may actually remain within its territorial jurisdiction, because it is the property of the federal government. It cannot tax the instruments which evidence the debts thus created and promise their repayment, although these belong to residents of such state, because such instruments were executed by an authority above its own, whose contracts it cannot subject to its taxing power, even though such contracts are in themselves pro-

perty. It cannot tax the credits evidenced by such contracts as separate properties, because until the contracts are terminated by the payment of the money due under them, the credits are inseparable from the instruments which secure them. In a word, it cannot tax these bonds, because they are operations of a government superior to itself, over which it cannot exercise jurisdiction or control in any form: *McCulloch v. Maryland*, 4 Wheat. 405, 429, 432, 435; *Weston v. City of Charleston*, 2 Pet. 466, 469; *Tennessee v. Davis*, *supra*. None of these reasons apply to the taxation by states of the obligations of other states, or of municipalities in other states, belonging to residents of the taxing states, because "the power in the states to tax for the support of the state authority reaches all the property within the state which is not properly regarded as the instrument or means of the federal government: *Transportation Co. v. Wheeling*, *supra*."

These considerations induced the belief that the Supreme Court would not adhere to its *dictum* in *The Foreign Held Bond Case*, 15 Wall. 324, that the taxable *situs* of state and municipal securities, was the *situs* of the respective debtor communities. It departed, indeed, from that *dictum* when in *Murray v. Charleston*, 96 U. S. 445, it limited the exercise of the taxing power of the states to such portions of their debts, as were owned by creditors living within the jurisdiction of the taxing states.

The theory that the locality of indebted states and cities fixed the *situs*, as *property*, of the evidence of debt which they issued, seems to rest upon a *dictum* of Lord MANSFIELD in *Robinson v. Bland*, 2 Burr. 1079; s. c., 1 W. Black. 246, cited in Story on Conf. of Laws, 7th ed., sect. 383. This was an action on a bill of exchange, given for money lost at play in Paris. The bill was drawn by the loser, when in Paris, on himself in England in favor of the win-

ner of the money. Lord MANSFIELD, in the course of his opinion, said, by way of illustration: "In every disposition or contract, where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or title of land, a mortgage, a contract concerning stocks, must all be sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here." In the case, as reported in 1 W. Black. 246, the words used by Lord MANSFIELD are stated to have been, "so stock jobbing contracts and the statutes thereupon have reference to our local funds." That opinion was delivered in 1760. So far as it relates to the funded debt of England, its language must be interpreted with strict reference to the nature of that funded debt, as it existed when the opinion was rendered. The funded debt of England, at that time, was made up of debts contracted by the government at different periods, evidenced by annuities charged upon particular branches of the public revenue for a period of time, or in perpetuity: Smith's Wealth of Nations, book 5, c. 3: 1 Bell's Comm. 6th ed. 523; McCulloch on Taxation and Funding 455; Williams on Pers. Prop., 4th Am. ed. 200. It is perfectly true that such annuities, when they were first created, were considered in England to be real property, descendible to the heir: *In re Ewin*, 1 Cr. & J. 155. Lord HARDWICKE, as late as 1750, considered them, apparently, as personal inheritances, which the law suffered to descend to the heir: *Stafford v. Buckley*, 2 Ves., Sr., Belt's ed. 178, 179. In Scotland they were regarded *quasi feuda*, because, by their yearly produce, they bore some resemblance to permanent rights: 2 Bell's Comm., 6th ed. 717; 1 Ersk. Law of Scot., 1871, 285. The inclination to treat such annuities as realty was naturally strong in Scot-

land, because there, by ancient law, all personal obligations, bearing interest until their maturity, were considered heritable: 1 Ersk. Law of Scot., 286, 287. It is possible that the Scotch rule and the opinion of Lord HARDWICKE in *Stafford v. Buckley*, above referred to, suggested the illustration which Lord MANSFIELD used. However that may be, it is quite certain that later authorities lead to conclusions very different from those which have been, more than once, drawn from what was said by Lord MANSFIELD in the case of *Robinson v. Bland*, already cited. Under the Legacy Duty Act of 36 Geo. 3, c. 52, the duty was made chargeable upon the legacy: Flood on Wills of Pers. Prop. 608. Unless the fund, constituting the legacy, was in Great Britain, the duty did not attach: *In re Ewin*, 1 Cr. & J. 151; *Thomson v. Adv. General*, 12 Cl. & F. 17. The *situs* of the fund was always the material inquiry. The domicile of the person bequeathing the legacy established the *situs* of the legacy for purposes of taxation: *Attorney-General v. Forbes*, 2 Cl. & F. 48; *Thomson v. Adv. General*, 12 Id. 17; *Arnold v. Arnold*, 2 Myl. & Cr. 256; *Wallace v. Attorney-General*, 1 Ch. App. Cas. 4; *Attorney-General v. Napier*, 6 Exch. (Wels., H. & G.) 219-222. In the leading case of *In re Ewin*, 1 Cr. & J. 151, the testator, who was domiciled in England, died possessed of considerable property in the American, Austrian, French and Russian funds, which funds were transferable and the dividends payable in those respective countries only. The executor was called on to give an account of the legacies and property of the testator, and to pay the legacy duties. *Brougham*, of counsel, contended that the property was in the nature of real property; and that it was, at all events, local property, being payable and transferable only in the countries in which the funds were. BAYLEY, B., in delivering his opinion, pp. 153-155, said,

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that the will operated upon that which "throughout, in my opinion, is English personal property. It was pressed by the counsel that this property was to be considered as being in the country in which it was real property. There is nothing in any part of the affidavits to show that such was the character that properly belonged to it; but some reliance was placed upon analogy between the case of this property and property in the English funds, which, in the creation of those funds, might originally be considered as being real property and descendible to the heir, but which, very soon afterwards, was considered to be personal property, and not descendible to the heir, but to go as personal property would go. Does it follow, because the English funds were originally considered as real property, that the French and American and Russian funds were also so considered?" * * * "If it is not real estate, it is personal estate; and if it is personal estate, is it in any respect to be considered different from personal property abiding in this country? There is no doubt but that the amount, when you are receiving the dividends, will be payable in the place in which, by the constitution of these funds, the dividends are payable; and that will be America, Paris or St. Petersburg. But you are not to look at the place where the thing is payable or transferable; but when once you have ascertained that it is personal estate, then you are to ascertain what are the rules of law with regard to personal estate; that personal estate being at the time not locally in this kingdom, but being at the time locally situated abroad." It was thereupon (page 156), concluded that the foreign funds, which were the subject of the controversy, were, in fact, English personal property, upon which legacy duties were chargeable. The case *In re Ewin* was pointedly referred to and approved in the case of *Thomson v. Adv. General*, 12 Cl. & F.

17, 20, 22, 24, 25, 26, Lord BROUGHAM concurring in the opinion (p. 24). Under the Succession Duty Act of 16 & 17 Vict., c. 51, sect. 42, the duty imposed was a first charge on the interest of the successor in all the real and personal property, in respect whereof such duty was assessed, while it remained in the ownership, or control of the successor. The act applies to the whole United Kingdom, but not to any country beyond those realms: *Wallace v. Attorney-General*, L. R., 1 Ch. Ap. 7 (1865). In *re Cigala's Settlement Trusts*, L. R., 7 Ch. Div. 351, the latest case bearing upon the question, the facts were these. An English woman, owning English funds, French *rentes* and shares in the Bank of France, and being about to marry an Italian, assigned these properties to four trustees, three of whom were Englishmen, upon trusts, after the death of the survivor of the husband and wife, for the children of the marriage. When the controversy arose, all the trustees were Englishmen. Both parents died leaving children, who were domiciled Italian subjects. The question was, whether the property in question was liable to the English succession tax. The fixed locality of the French *rentes* was relied on by counsel (p. 354). But it was held by JESSEL, M. R. (pp. 355, 356, 357), that the properties in question were movable properties; that the ownership of the properties being in persons subject to British jurisdiction, and the forum for deciding upon the claims of the children being a British court, and the properties being, in fact, English property, the crown was entitled to the succession tax.

It is proper to note, at this point, that the cases of *Attorney-General v. Cockerell*, 1 Price 165, and *Attorney-General v. Beatson*, 7 Id. 560, which have some relation to the questions involved in this case, were overruled by *Attorney-General v. Forbes*, 2 Cl. & F. 80; *Arnold v. Arnold*, 2 Myl. & Cr. 272; *In re Coales*,

7 M. & W. 394, and by *Thomson v. Advocate-General*, 12 Cl. & F. 23.

The reasoning of Mr. Wharton (*Conflict of Laws*, sects. 297-311), and the rule laid down by him, sect. 311, is supposed to be at variance with the authorities which I have cited, and with the conclusions drawn from them.

Mr. Wharton says, sect. 311, that the rule of international law may be thus stated: "Movables, when not massed for the purposes of succession or marriage transfer, and when not in transit, or following the owner's person, are governed by the *lex situs*, except so far as the parties interested may select some other law." Phillimore, alluding to the very rule stated by Wharton, says, that, whatever may be the merits of the doctrine, the time for adopting it can hardly be said to have yet arrived: 4 Phill. on Internat. Law 37; Story on Conflict of Laws, 7th ed., sects. 379-381. No rule is of value, which fails to supply the means of ascertaining with precision, the subject-matter to which it is applicable. Mr. Wharton excepts from the operation of the *lex rei sitæ* goods which follow the person of the owner, without incorporating in his rule any method of determining what movables have this quality, and what movables must be considered as devoted to a purpose, which binds them as fixtures to a particular place: Savigny on Conflict of Laws by Guthrie, London, 1880, p. 180. So much of his rule as is applicable to the matter in controversy, amounts to no more than this: "Movables * * * when they do not follow the owner's person, are governed by the *lex situs*." There certainly can be no question that this is true, but it does not give any help in reaching a conclusion in this case. As the author bases his reasoning to a large extent on the text of Savigny, it would seem that he ought to have expressed in his rule, the limitation which Savigny engrafted on the theory which he adopted: Savigny on Conflict of Laws

by Guthrie, ed. 1880, p. 180. He ought to have done more than this. The cases cited show that movable properties are not only massed for purposes of succession at the domicile of the person upon whom said properties legally devolve, but also for purposes of taxation: *In re Ewin*, 1 Cr. & J. 155; *In re Cigala Settlement Trusts*, L. R., 7 Chan. Div. 357, and other cases already cited. If these considerations had been kept in mind, the rule would have read as follows: Movables when devoted to a purpose which binds them as fixtures to a place, and when not massed for the purposes of succession, or marriage transfer or taxation, and when not in transit, are governed by the *lex rei sitæ*. Other movables are governed by the *lex domicilii*, except so far as the parties interested may be competent to select and have selected some other law.

It may, some day, be decided that the debts of states, forming parts of our Federal Union, and of municipal organizations in such states, have, by the law of nations, their *situs* within the territory of the government of which, in the view of that universal law, those states and municipal organizations form parts. It can scarcely be imagined that a narrower doctrine will ever prevail.

In view of the decisions of the Supreme Court which have been adverted to, and of the relations of the states of our Union to each other, it is impossible to accept the theory of Mr. Wharton that public loans, and railway and other securities, are subject only to the *lex rei sitæ*, as the correct statement of the rules of international law applicable to such cases in the United States. The argument upon which he mainly relies, would not support such application of his theory. The fullest recognition of the application of the rule, *mobilia sequuntur personam*, to the securities of states and municipalities in states, in this country, would not create any danger that creditors, citizens of other states, in the same

Union, might exercise undue political influence in the affairs of an indebted state: Wharton on Conflict of Laws, sect. 305. It is impossible to frame a theory, which would show that increase of danger to any state would result from holding that a debt due by it, belonging to a resident of another state, was property in such other state. Nor is the principle insisted upon modified when evidences of debt, issued by a state or municipality, are registered by the debtor community in the name of the holders of such debts, and are required to be transferred, upon a prescribed registry, in the manner directed by local laws. Such debts, when so registered, would not in any way differ in their character of property from unregistered evidences of like indebtedness, which were transferable by simple endorsement, nor, indeed, from similar evidences of debts payable to the bearers, or holders of such evidences of debt: *In re Ewin*, 1 Cr. & J. 151. Conditions, regulating the mode of transfer of such securities, existed in reference to the bonds of the city of Charleston: *Murray v. Charleston*, 96 U. S. 440; but they did not hinder the court from deciding that such bonds had no taxable *situs* within the municipal jurisdiction of Charleston if their owner was a non-resident of the state. The ruling of the Supreme Court in *Johnston v. Laffin*, 103 U. S. 804, equally shows that local conditions, regulating transfers of incorporeal property, create no *situs* for such property.

There is no reason why a debt due by a state to a citizen of another state, and which is, therefore, the property of a citizen in such other state, should be considered as property having its only legal *situs* within the territory of the indebted state. If any such rule is applicable to the debts of states, it is equally applicable to the debts of cities and counties in any state. It cannot be supposed, that, in the absence of any legislation affecting the question, any court

would hold that the debt due by a city, or county, to a resident of another city, or county, in the same state, was property which had become blended with the general mass of property in the indebted city, or county, when the creditor did not live in such indebted city, or county? And yet, if the reasoning of Wharton is well founded, this would be the necessary conclusion.

The argument in favor of the taxing power of a state, over such securities, is summed up in a portion of the first maxim set forth in Story on Conf. of Laws, sects. 18, 23, cited and adopted by the Supreme Court in *Hoyt v. Sprague*, 103 U. S. 630. "Every nation possesses an exclusive sovereignty and jurisdiction within its own territory. * * * The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are residents within it whether natural born subjects or aliens."

The argument against the existence of a taxing power in debtor states, and debtor municipal organizations in such states, over such securities, when owned by a non-resident, is summed up in the second and third maxims of the same author, also cited and adopted by this court in 103 U. S. 630, 631. These maxims, considered together, assert that no state, or nation, can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein, unless the laws of the country, in which such property is situated, or in which such persons reside, sanction the exercise of such extra-territorial power. These last maxims are stated, in another form, in Story on Conf. of Laws, 7th ed., sect. 388. "The municipal laws of a country have no force beyond its territorial limits; and when another government permits them to be carried into effect within her jurisdiction, it does so upon a principle of comity."

It may be true that a general usage, in relation to the *situs* of state and municipal bonds and evidences of debt, might, if it existed in the United States, create a different rule from that sought to be maintained upon the basis of prevailing authorities, but no such general usage exists in this country. This is conclusively proved by the references subjoined to the provisions of the Codes, Revised Statutes, or collections of the General Statutes of states, whose legislation exists in a form permitting convenient examination. In the following states, as will appear by the references appended, the bonds, or stocks of other states, and of cities and counties in other states, owned by residents of the respective states, are, either by express designation, or under the broader but equally definite name of public securities, required to be valued to the owner thereof in the state in which he resides. Arkansas: Digest of Stat., 1874, ch. 116, sect. 5047, p. 885. Delaware: Revised Code of 1852, as amended in 1874, pp. 53, 54, vol. 14 Laws, ch. 22. Georgia: Code of 1873, sect. 801, p. 142. Indiana: Stats. 1876, vol. 1, ch. 22, sect. 3, p. 73. Iowa: Rev. Code, 1880, sect. 801, p. 192. Kansas: Stats. 1876, vol. 2, sect. 2, pp. 1006, 1009. Maine: Rev. Stats. 1871, tit. 1, ch. 6, sect. 5, p. 129. Maryland: 1 Code, art. 81, sect. 2 (1874), ch. 483, sect. 2 (1876), ch. 260 (1878), ch. 413 (1880), ch. 122. Massachusetts: Gen. Stats. 1860, ch. 11, sect. 4, p. 74. Michigan: Compiled Laws, 1871, vol. 1, ch. 21, sect. 3, pp. 359, 360. Minnesota: Gen. Stats. 1878, ch. 11, sect. 1, p. 211. Mississippi: 1880, ch. 10, sect. 468, p. 151, sect. 474, p. 153. Missouri: Rev. Stats. 1879, vol. 2, ch. 145, sect. 6664, p. 1306. Nebraska: Gen. Stats. 1873, ch. 66, sect. 2, p. 897. New Hampshire, General Laws, 1878, tit. 8, ch. 53, sect. 6, p. 139. New York: Saxton's Tax Laws, 1880, p. 31, Rev. Stat., 6th ed., p. 932. North

Carolina: Battle's Revisal, 1873, ch. 102, sect. 9, sub-sect. 5, p. 760. New Jersey: Revision, 1877, p. 1151, par. 63. Ohio: Rev. Stats. 1880, vol 1, tit. 13, ch. 1, sect. 2730, p. 706. Oregon: Gen. Laws, 1843—1872, ch. 57, tit. 1, sect. 1, p. 748. Pennsylvania: 2 Brightly's Purd. Dig., 1872, p. 1386, sect. 170. Rhode Island: Gen. Stats. 1872, tit. 8, ch. 39, sect. 10, p. 104. Tennessee: Acts of 1879, ch. 221, p. 264. Texas: Rev. Stats. 1879, tit. 95, ch. 2, art. 4671, p. 679. Vermont: Gen. Stats. 1862, tit. 26, ch. 83, sect. 4, p. 516. West Virginia: Rev. Stats. 1879, ch. 186, sect. 47, p. 1071. Virginia: Code, 1873, tit. 12, ch. 33, sect. 49. In the following states such properties are certainly taxable, when so owned, under the general language of the taxing laws of such states. Alabama: Code, 1876, tit. 7, art. 3, sect. 362, p. 258. Connecticut: Revision of 1875, tit. 12, ch. 1, sect. 14, p. 156. Illinois: Rev. Stat. 1880, ch. 120, sect. 1, p. 868. Wisconsin: 1878, tit. 13, ch. 48, sect. 1034, p. 339.

The usage, which would enable an indebted state to hold out to citizens of other states, who might purchase its securities, immunity of the property thus acquired from taxation by the states of which they were citizens, would be fraught with injury to such other states. If the rule, *mobilia sequuntur personam*, can be regarded only as a fiction of law, it is certainly necessary for the purposes of justice, in matters of taxation, that the fiction should be maintained, in order that the vast and widely diffused sum

of wealth represented by the debts of states, counties, townships, school districts, cities and municipalities, should be taxed in the hands of its possessors by the states in which such possessors respectively reside: *Green v. Van Buskirk*, 7 Wall. 150.

It is immaterial whether securities, issued by another state, or by a municipality incorporated by another state, and owned by a resident of the taxing state, were or were not exempted from taxation by the state which authorized the issue of such securities. Such exemption can have no extra-territorial operation: 103 U. S. 630, 631, except by general usage, or by a comity which had attained the force of general usage. There is, of course, no need of any argument to show that securities, issued by other states, or by municipal or other corporations incorporated by other states, are not exonerated from taxation in the state which exercises this power, because such securities are not taxed in such other states, under their general laws, when owned by residents of such other states. Each state is free, in the absence of constitutional provision to the contrary, to exempt from taxation any class of property belonging to residents of such state, to which it may see proper to grant such immunity. The power thus exercised can never operate beyond the jurisdiction of the state exercising it. No state can, by its legislation, protect from taxation property within the jurisdiction of another state, owned by a resident of such other state.

C. J. M. GWINN.

Supreme Court of Michigan.

CUDDY v. HORN.

The rule by which one who rides in a private conveyance is presumed to control, or be identified with, the driver, and to have no right of action for any injury done him by a collision caused by the driver's negligence, cannot apply to passengers in public conveyances, such as railway cars or steamboats, even though they have chartered the conveyance.

The master of a vessel cannot relieve himself of responsibility for its safe management by surrendering its control to a charterer.

Where a passenger in a conveyance can have no control over those in charge of it, he cannot be held to be so identified with them as to be considered a party to their negligence.

Passengers on a steam yacht chartered for their use, but not under their control in matters of navigation, have a right of action against its owners for injuries caused them by the negligent management of those in charge of it.

An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable, either jointly or severally.

If a passenger upon one vessel is injured by its collision with another in consequence of the negligence of the officers of both, he has a right of action against them jointly, and it is for the jury to fix the liability where it belongs.

Where evidence tends to make out a case for the plaintiff, its force and effect is for the jury, and the Supreme Court will not attempt to review or weigh it.

The Limited Liability Act of Congress exempting ship-owners from personal liability for injuries caused by the negligence of those in charge of their vessels, does not apply to boats navigating streams connecting the great lakes.

ERROR to the Superior Court, Detroit.

Alfred Russell, James Caplis, Henry M. Campbell and Henry M. Duffield, for plaintiff in error.

Wisner & Speed, for defendant in error.

MARSTON, C. J.—The following statement of facts taken from the briefs of counsel for the defendants, is sufficiently full and accurate for a definite understanding and discussion of the legal questions raised. The action was commenced by the plaintiff, as administrator of the estate of John Kelley, deceased, to recover damages on account of his death caused by a collision between the steamer "Garland," of which the defendant, Horn, was owner, and the steam yacht "Mamie," owned by other defendants, on the Detroit river, July 22d 1880. The declaration alleged, in substance, that the "Garland" was going down the river upon a

pleasure excursion, and the "Mamie" was coming up, returning from a pleasure excursion, and that Kelley was a passenger on the "Mamie"; that by failure of the master of the "Garland" to keep a proper lookout, and by his failure to give proper signals at the proper time upon the approach of said "Mamie," as required by rule 3 for the government of pilots, and by reason of the failure of the master of the "Mamie" to give the proper signals to indicate upon which side she would pass until the vessels had approached so near that a collision was inevitable, and by reason of the failure of the owner and master of the "Mamie" to keep a proper lookout upon said "Mamie," said vessels collided, and said "Mamie" sank, causing the death by drowning of said Kelley.

The defendant, Horn, and the other defendants filed separate pleas of the general issue. The owners of the "Mamie" also filed a plea in abatement, alleging that proceedings had been commenced, and were then pending in the District Court of the United States by them as owners of the "Mamie," for the purpose of taking advantage of the statute of the United States limiting the liability of vessel owners in certain cases. And special notice of such proceeding was also given with the plea of the general issue.

A trial was had upon this plea, and a verdict, by direction of the court, rendered for the plaintiff thereon, and the trial thereupon proceeded upon the plea of the general issue, and a verdict was rendered in favor of the defendants. The case comes here on writ of error, and the points relied upon by the defendants will be considered in order.

The position taken by defendant, Horn, was, that the plaintiff's intestate was a passenger on the "Mamie" at the time of the alleged collision, and the "Mamie" having contributed to the collision, plaintiff's intestate must, in law, be held to have been so far identified with those in charge of the yacht, that he could not have recovered, if he had survived, for an injury suffered by him occasioned by such collision, and that, under the terms of the chartering or hiring of the yacht, he could not have recovered for an injury so received.

It appeared that Rev. A. F. Bleyenbergh had chartered the steam yacht "Mamie," to carry a party of altar-boys and others, twenty-one in all, and fourteen of them from eleven to fifteen years of age, from Detroit to Monroe and back, for which he was to

pay \$20; and that the yacht was in charge of the master and engineer thereof placed there by the owners. At the time of chartering the yacht it was stated that there would be about twenty persons to go on the trip, but no limit was placed upon the number or as to the route to be taken in going to and returning from Monroe.

It has not, and could not be claimed, that young Kelley had any authority or control whatever over the master or engineer of the yacht, or that he could have changed or directed the movements of the yacht in even the slightest degree. And while Father Bleyenbergh, we may assume, could and did have charge of the yacht, as to the time of starting, the number of passengers and such like, yet, as to the due and proper management of the vessel, the steam she should carry, the speed at which she should be run, the course she should take within certain limits, the rules she should observe in meeting and passing other vessels, the lights she should carry, in a word, the laws and rules applicable to such crafts while navigating the rivers and lakes, were matters over which he could not rightfully be permitted to have any control or direction whatever. These were matters which the master of the vessel could not legitimately turn over to the guidance of any person who may have chartered the boat for a trip to and from a certain point. Had directions been given the master to run the yacht ashore, or upon a rock, or to run down upon and destroy a rowboat, or to not give and answer the necessary signals when approaching another vessel, or to not carry proper lights, clearly the master would have been under no obligations to obey such orders, and neither he nor the owners of the vessel could have justified such a departure from duty by setting up the authority or directions of Father Bleyenbergh therefor. In this case it was the legal duty of the yacht to carry proper lights at night, and to give and answer certain signals in due and proper time when approaching another vessel, and what the law had thus directed to be done could not be varied, changed or controlled by any person who may have chartered the vessel for the occasion. And where a person can rightly have no voice or control, he cannot be held so identified with those in charge as to be considered a party to their negligence. It seems to me that any other rule could but point out the way to owners of vessels in which they could violate all rules and regulations adopted

to insure the safety of passengers without incurring any liability therefor.

The reason for holding a person riding in a private conveyance identified with the driver thereof, and, therefore affected by the negligence of the latter, cannot fairly be held applicable in cases like the present. In the case of a private conveyance the driver is under the direction and control of the passenger, and, if not, the latter may well decline to intrust his safety further in such conveyance. When, however, a person enters a public conveyance, and certainly a railroad train or a steamboat, he has no such control over the movements of either, and whether he may have chartered such conveyance for a special purpose or not, yet for a faithful observance of the rules of law enacted for the running or navigation thereof, he cannot be held responsible in a case like the present, where the master is not his servant and is not subject to his direction or authority.

The authorities cited by counsel for plaintiff in error, and which decline to follow *Thorogood v. Bryan*, 8 C. B. 115, should be followed in the present case. The charterer in this case did not appoint the officers of the boat, but was himself, and those who accompanied him, under and subject to their power in the navigation of the vessel; and if they, thus controlling the movements of the "Mamie" while running, and representing the owners thereof, were guilty of negligence in the performance of their duties, those aboard have a remedy for injuries suffered in consequence thereof. See also *Covington T. Co. v. Kelley*, 36 Ohio St. 86.

It was next insisted that there was no joint liability on the part of the defendants. The question is not free from embarrassment, and upon a trial the danger is that each defendant is interested in endeavoring to throw all the blame upon the other, and perhaps attempt to prove acts of negligence not set forth in the declaration. In opposition to this, it may be said that negligence caused a collision by which plaintiff's intestate was killed, and that a remedy is given by statute to recover damages therefor; that if separate actions are brought different juries may acquit all the defendants, and thus the plaintiff be defeated, although his right to recover be unquestioned. When, therefore, such embarrassments are likely to arise upon the trial, and bearing in mind that the plaintiff is without fault and is entitled to recover—at least we must so consider in the discussion of this question—is not the plaintiff who

has thus suffered the wrong entitled to a remedy, and that the difficulties and dangers are to be thrown upon those presumably in the wrong, rather than upon him who was not in fault? If, in either view, injustice is likely to be done, should not the defendants assume, or be charged with, the risk? Is there, however, likely to be any injustice done in holding them jointly liable? I think not. The facts are likely to be brought out in such a trial; neither will be interested in keeping back any thing tending to show that it was the other alone that was in fault; and we cannot assume that any wilfully false evidence will be given in the case. The facts are quite likely, therefore, to be fully presented to the jury, who can place the responsibility where it rightfully belongs, either by holding both liable or by holding one party liable and acquitting the other.

An act wrongfully done by the joint agency or co-operation of several persons will render them liable jointly or severally. The injury done in this case resulted from a collision caused by the contemporaneous act of two separate wrongdoers, who, though not acting in concert, yet by their simultaneous wrongful acts put in motion the agencies which together caused a single injury, and for this the injured party could receive but a single compensation. It is a fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed. That rendered them jointly liable to the person injured, whether the act was done by the procurement of one person or of many; and if by many, whether they acted with a common purpose or design in which they all shared, or from separate and distinct motives and without any knowledge of the intention of each other, the nature of the injury is not in any degree changed or the damages increased which the injured party has a right to receive: *Stone v. Dickinson*, 5 Allen 80.

In *Colegrove v. N. Y. Cent. & Hud. River Railroad Co.*, 20 N. Y. 492, it was held that a passenger injured by a collision resulting from the concurrent negligence of two railroad corporations could maintain a joint action against both. *Cooper v. E. T. Co.*, 75 N. Y. 116, was a case where death had resulted from a collision by two vessels, and an action against both was maintained. In my opinion this action may be maintained against the owners of both vessels: *Hillman v. Newington*, 28 Albany Law Jour. 294.

It was next insisted that the case made by the plaintiff showed no fault or negligence on the part of the owners of the "Mamie" that would justify a verdict against them. The rule must now be considered as settled in this state, that where the evidence tends to make out a case for the plaintiff, the force and effect thereof must be submitted to the jury, and that this court will not attempt to review or weigh it.

In a case like the present it would be dangerous in the extreme for this court to attempt to find the facts or to draw inferences from the facts proven, or to attempt to say what might be considered an act of negligence or sufficient evidence thereof. In our opinion the case upon this point should have been submitted to the jury; and, in view of the fact that there must be a new trial, it is better that this court should not enter upon a discussion of the facts which lead us to this conclusion. It was also urged that this case came within the limited liability act of Congress, and that the defendants, owners of the "Mamie," were not personally liable. The learned judge before whom the case was tried held that the "Mamie" did not fall within the provision of the United States statutes, citing in support thereof *Am. Transp. Co. v. Moore*, 5 Mich. 368, and *The Mamie*, 5 Fed. Rep. 813. We are of opinion that these cases fully covered this question, and that the view taken by the court below upon this point was correct.

As we have thus passed upon all the material questions raised, and are of opinion that the court erred upon the questions designated, the judgment will be reversed, with costs, and a new trial ordered.

The other justices concurred.

It is undoubtedly the law that the contributory negligence of a servant will defeat the master's action for negligence against a third person: *Putbaugh v. Reasor*, 9 Ohio St. 484; *Prideaux v. Mineral Point*, 43 Wis. 527.

The question is, what persons stand in such relations to the injured party that their negligence will be imputed to him? in other words, who are his servants? It will be attempted to answer this question:

I. As to public carriers. In *Thorogood*

v. Bryan, 8 C. B. (M., G. & Scott) 115, Thorogood was a passenger in Barber's omnibus. He alighted from it without requiring it to be driven up to the curb and stopped. He was run down by a competing omnibus, owned by the defendant, for whom there was a verdict, on the ground that the failure of the driver to draw up to the curb and put plaintiff down was contributive negligence imputable to plaintiff whose servant the driver was held to be.

To the suggestion that a passenger in a public conveyance has no control over

the driver thus MAULE, J.: "But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. According to the terms of his contract, he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. It is somewhat remarkable that actions of this sort are almost invariably brought against the rival carriage or vessel, which is only to be accounted for by that party spirit which more or less enters into every transaction of life. If there is negligence on the part of those who have contracted to carry passengers, those who are injured have a clear and undoubted remedy against them. But it seems strange to say that although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible for an injury to a passenger. The passenger is is not without remedy. But, as regards the present defendant, he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust." The other judges concurred. See to the same effect *Armstrong v. Lancashire Railroad Co.*, L. R., 10 Exch. 47; *Bridge v. Grand Junction Railroad Co.*, 3 M. & W. 244.

The same question came before the Supreme Court of Pennsylvania in *Lockhart v. Lichtenthaler*, 46 Penn. St. 151. Lichtenthaler was a brakeman upon coal cars, which, while running upon a railway, were derailed by running over an oil barrel negligently placed upon the track by defendant, Lockhart's, servants. The defendants set up the negligence of those in charge of the train as a defence. The court affirmed the rule,

making liable the carrier, whose negligence concurred in causing the injury. "I do not think, however," said THOMPSON, J., "that the rationale of the principle that concurring negligence leaves the party to look to his own employee is satisfactorily expounded in the opinions of the judges in *Thorogood v. Bryan*, viz., the identity of the passenger with his own vehicle. I would say the reason for it is that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances as an incentive to care and diligence. As the law fixes responsibility upon a different principle in the case of the carrier as already noticed from that of a party who does not stand in that relation to the party injured, the very philosophy of the requirement of greater care is, that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own. It would be altogether more just to hold him who has engaged to observe the highest degree of diligence and care, and has been compensated for so doing, rather than him upon whom no such obligation rests, and who, not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware even of the presence of a party who might be injured. This rule, it cannot be doubted, will be more likely to increase diligence than its opposite, which would enable a negligent and faithless party to escape the consequences of his want of care by swearing it on to another, which he would assuredly do if temptation and opportunity offered. As this view best accords with the law, it is proof of the existence of the rule itself."

These are the leading decisions conflicting with the principal case. In

Thorogood v. Bryan the plaintiff got out of the stage in a crowded street without requiring the driver to stop or pull up to the curb. The decision might well have been grounded upon plaintiff's personal contributive negligence. It may be doubted whether even the English courts consider the question settled by this case, for it was decided upon a rule to show cause, a circumstance regretted by one of the judges, who said the subject was an important one and *ought to be definitively set at rest*. And see the disparaging criticisms of the rule in 1 Sm. Lead. Cas. 220. See also *Tuff v. Warman*, 2 C. B. N. S. 750; *Waite v. N. E. Railroad Co.*, El. B. & El. 728; *The Milan*, Lush. Adm. 388; 31 L. J. (P., M. & A.) 105. And the courts of New York, New Jersey, Kentucky and Wisconsin have dissented to it with great ability and vigor. See cases *infra*.

In affirming that the reason for the rule holding the carrier alone responsible is, that so to do will be an incentive to greater care and diligence, the Pennsylvania decision places the rule upon a much more solid foundation than if it be merely rested upon the legal fiction of identity of the passenger with the carrier. But where the concurring negligence is that of two carriers, care and diligence would be increased to a still greater degree by a rule making both liable jointly or severally.

But the Pennsylvania case seems to give only a partial adoption to the rule in *Thorogood's Case*. It holds that the negligence which would be a defence must be directly involved in the result; it must by itself, or concurring with the defendants, be the *proximate* cause of the death, and it is said that "running too rapidly on a road in bad repair, driving instead of drawing the train," would not, abstractly, be such negligence as would be a defence. To be such, the consequences of these acts, or some of them, must have directly en-

tered into and become active agents in the very disaster itself: *Lockhart v. Lichtenthaler*, 46 Penn. St. 151, and see *Mann v. Wieand*, 4 Weekly Notes of Cases 6. In this case A. obtained permission to ride, and he did ride with B. C.'s dogs frightened B.'s team; it ran away; A. was thrown out and injured, and sued C. It was sought to impute the negligent acts of the driver to A. The court said: "But the husband (A.) had no control or authority over the driver; nor did the driver control the personal conduct of the husband. He, therefore, was not liable for the negligent conduct of the driver. * * * Nor is it any defence to the action that the injury was caused by the joint negligence of the driver and the plaintiff in error (C.) * * * Negligence, in a general sense, by the driver would not protect the plaintiff in error from liability for a direct and proximate injury caused by his own negligence."

With regard to goods, it is so established by the decisions, that the contributive negligence of the carrier bars an action by the owner against a third person whose concurrent negligence has also contributed to the injury. "There is no analogy between the cases in which passengers in one conveyance have been held entitled to an action against the owner of either or both of the vehicles, from the negligent management of which injury has been received. There is no bailment and no agency in those cases;" but as to goods the carrier is held to be "the bailee and quasi the agent of the shipper:" *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 471; and see *Vanderplank v. Miller*, 1 Moody & Malkin 169; *Simpson v. Hand*, 6 Whart. (Pa.) 311; *Duggins v. Watson*, 15 Ark. 118; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Smith v. Smith*, 2 Pick. 622."

Dissenting from the rule laid down in *Thorogood's Case*, are the following decisions: *Bennett v. New Jersey Railroad &*

T. Co., 36 N. J. L. 225. A passenger in a horse car was injured in a collision caused by the carelessness of the engineer of a locomotive owned by the railroad company defendant. The company set up contributory negligence by the horse car driver as a defence. Said BEASLEY, C. J., "The proposition claimed to be law is, that when a passenger enters a public conveyance, he, in some sort, becomes affected by the negligence of the agents of those in charge of such conveyance, at least to the extent of debaring him from suits against third parties for injuries occasioned by the joint carelessness of such third parties, and that of the servants having the control of the vehicle in which he is riding."

The position has for its support the case of *Thorogood v. Bryan*, 8 Mann., Gr. & Scott 116. The authority is in every respect in point. * * * The reason given for the judgment is, that the passenger in the omnibus must be considered as identified with the driver of the omnibus in which he voluntarily becomes a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could result only in one way, that is by considering such driver the servant of the passenger. I can see no ground upon which such a relationship is to be founded. In a practical point of view it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it

would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly imply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious in a suit against the proprietor of the car, in which he was a passenger, there could be no recovery if the driver or conductor of such car is to be regarded as the servant of the passenger, and so on the same ground each passenger would be liable to every person injured by the carelessness of such driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes, and yet it is to be presumed that no court would go this length and impose on each person being carried by a railroad train responsibility for the misconduct of the engineer or conductor of such train. The doctrine of the English case appears to convert the driver of an omnibus into the servant of the passenger, for the single purpose of preventing the passenger from bringing suit against a third party, whose negligence has co-operated with that of the driver in the production of the injury. I am compelled to dissent to such a proposition. Under the circumstances in question, the passenger is a perfectly innocent party having no control over either of the wrongdoers, and I can see no reason why, according to the usual rule, an action will not lie in his behalf against either or both of the employers of such wrongdoers."

Webster v. Hudson Railroad Co., 33 N. Y. 260. In this case, HUNT, C. J., speaking of the passenger injured, said: "Like every passenger in a train of cars propelled by steam he was passive in the hands of the railroad company; unable to aid if aid was useful; unable to delay or hasten a train; incompetent

and not permitted to regulate or examine its machinery. His personal safety was entirely under the control of others. * * * The imputation to the plaintiff of the negligence of another is based upon no sound principle."

And to the same effect see *Chapman v. New Haven Railroad Co.*, 19 N. Y. 341; *Brown v. N. Y. C. Railroad Co.*, 32 N. Y. 597; *Sheridan v. Brooklyn, &c., Co.*, 36 N. Y. 39; *Colegrove v. New York, &c., Co.*, 20 N. Y. 492; *Barrett v. Third Avenue Co.*, 45 N. Y. 629. In Kentucky, see to the same effect *Danville, &c., Co. v. Stewart*, 2 Metc. 119; *Louisville, &c., Co. v. Case*, 9 Bush 728. In Wisconsin, see *Prideaux v. Mineral Point*, 43 Wis. 513. In Ohio, see *Transfer Co. v. Kelly*, 36 Ohio St. 86; and see *Perry v. Lansing*, 24 N. Y. S. C. (17 Hun) 34; *Hillman v. Newington*, California 1880, 23 Alb. L. Jour. 294; *Cooper v. Eastern Tr. Co.*, 75 N. Y. 116; *Otis v. Thom*, 23 Ala. 469.

II. AS TO PRIVATE CARRIERS.

Robinson v. N. Y. Central, &c., Railroad Co., 66 N. Y. 11, was the case of "a gratuitous ride by a female upon the invitation of the owner of a horse and carriage." She was injured by a collision with a train upon defendant's road. Said CHURCH, C. J.: "Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if by his negligence he had injured a third person, she would not be liable. She was not responsible for his acts, and had no right and no power to control them. True, she had consented to ride with him, but as he was in every respect competent and suitable, she was not negligent in doing so. Can she be held, by consenting to ride with him, to guarantee his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of the plaintiff, but it was not an unlawful or negligent act. She was injured by the negligence of a third person, and

was free from negligence herself, and I am unable to perceive any reason for imputing Coulon's negligence to her.

"If his negligence contributed to the injury, he is liable also to an action, but that does not exonerate the defendant. Suppose Coulon had, by grossly negligent driving, turned over the carriage and injured the plaintiff, is there a doubt but he would be liable to an action for the injury in her behalf. These views proceed, of course, upon the assumption that there was no relation of principal and agent, or master and servant. Nor were they engaged in a joint enterprise in the sense of mutual responsibility for each others acts, as in *Beck v. East River Ferry Company*, 6 Robertson 82."

In the case here alluded to, a party in a row-boat were run down by a steamboat, against whose proprietors an action was brought by the representatives of one of the men who was drowned. The court said: "The deceased was undoubtedly chargeable with any neglect of his comrades, as well as his own, to do every act to avoid danger and insure safety, at least, unless he did all he could to repair the deficiency. None of them stood in the light of either employer or employed to the other; it was a joint expedition in which each was liable for the acts and omissions of the other, unless he took some separate step to repair or prevent the result of the negligence of the others: *Beck v. East River Ferry Company*, 6 Robertson (N. Y.) 82. This case certainly is distinguishable from *Robinson v. N. Y. Central, &c., Railroad Co.*, *supra*, in this: Joint enterprisers have an authoritative voice, and speak of right in the management and control of the enterprise—and have control to a greater or less extent, may reasonably be held responsible for bad management. On the other hand, a lady or any other guest in a carriage cannot direct its management and movements of right and with power to enforce his or her commands. Any con-

trol over it which the guest may exercise, is only by the courtesy and consent of the owner. The view of the court in *Robinson v. N. Y. Central, &c., Railroad Co.* is sustained in *Knapp v. Daggs*, 18 How. Pr. 165; *Metcalf v. Baker*, 11 Abb. Pr. (N. S.) 431; *Dyer v. Erie Railway*, 71 N. Y. 228.

But the distinction between *Beck's Case* and *Robinson's Case*, *supra*, taken by the New York court has not been perceived in all courts. Thus in *Prideaux v. Mineral Point*, 43 Wis. 529, Mr. Chief Justice RYAN said: "It is difficult to comprehend the distinction. The court says that it was the case of a gratuitous ride, by a female upon the invitation of the owner of a horse and carriage. Doubtless; but there is the same mutual agreement of two to travel together as of the several to sail together, in *Beck v. Ferry Co.* These were in contemplation of law as much in the same boat as those. A woman may and should refuse to ride with a man, if she dislike or distrust the man, or his horse, or his carriage. But if she voluntarily accept his invitation to ride, the man may, indeed, become liable to her for gross negligence; but as to third persons, the man is her agent to drive her—she takes man, horse and carriage for the jaunt, for better, for worse." And again (p. 528): "One voluntarily, in a private conveyance, voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumed the risk of the skill and care of the person guiding it. *Pro hac vice*, the master of a private yacht, or the driver of a private carriage, is accepted as agent by every person voluntarily committing himself to it. When *pater familias* drives his wife and child in his own vehicle, he is surely their agent in driving them, to charge them with his negligence.

It is difficult to perceive on what prin-

ciple he is less the agent of one who accepts his or their invitation to ride with them. There is a personal trust in such cases which implies an agency. So, several persons voluntarily associating themselves to travel together in one conveyance, not only put a personal trust in the skill and care of that one of them whom they trust with the direction and control of the conveyance, but appear to put a personal trust, each in the discretion of each, against negligence affecting the common safety. One enters a public conveyance in some sort of moral necessity. One generally enters a private conveyance of free choice; voluntarily trusting to its sufficiency and safety. It appears absurd to hold that one voluntarily choosing to ride in a private conveyance, trusts to the sufficiency of the highway, to the care and skill exercised in all other vehicles upon it, to the care and skill governing trains at railroad crossings, to the care and skill of everything, except that which is most immediately important to himself; and trusts nothing to the sufficiency of the very vehicle in which he voluntarily travels, nothing to the care or skill of the person in charge of it. His voluntary entrance is an act of faith in the driver; by implication of law, accepts the driver as his agent to drive him. In the absence of express adjudication, the general rules of implied agency appear to sanction this view. The negligence of the driver was held imputable to the woman in this case: *Prideaux v. Mineral Point*, 43 Wis. 513, affirmed in *Otis v. Janesville*, 47 Id. 422. See also, *Houfe v. Fulton*, 29 Id. 206; s. c. 34 Id. 608; *L. S. & M. S. Railroad Co. v. Miller*, 25 Mich. 274.

The true view appears to be this: the passengers in any conveyance, whether carriage or boat, may be joint enterprisers, and as such, jointly in control of the conveyance, and jointly and severally chargeable with each other's mismanagement. Again, some of the

passengers may be guests of those in charge of the conveyance. Having no control over the management of the conveyance, guests are not imputable with their negligence. Lastly, passengers may, as to some persons in the conveyance, hold the relation of master and servant. Having control over such persons, their negligence is imputable to the passengers. To illustrate: Two young men together hire a carriage and driver, in which to ride, accompanied by two ladies. The ladies are guests, and, except by courtesy, have no control over either young men or driver, whose negligence is therefore not imputable to them. The driver is the servant of the young men. They may control his actions, hence they are responsible for his want of care. The young men are

joint enterprisers, and as such, each is responsible for the other's carelessness.

As to officers and employees of public carriers, they appear, from the ablest and preponderating authorities, not to be servants whose negligence is imputable to passengers. As to private carriers, the question appears to be largely one of evidence. If the facts show the relation of joint enterprisers, or of master and servant, then the negligence of a joint enterprisor, or of a servant, is imputable to the other joint enterprisers, or to the master. But the writer inclines to the view that a mere guest is not a master or a joint enterprisor. Surely, a guest ought not to be made responsible for the actions and negligence of those over whom he has no control.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Illinois.

THE WASHINGTON ICE CO. v. SHORTALL.

Grants of land bounded on rivers or upon the margins above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the margin. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it, and this title to the middle of the stream includes the water, the bed and all islands.

When the water of a flowing stream, running in its natural channel, is congealed, the ice attached to the soil constitutes a part of the land and belongs to the owner of the stream, and he has the right to prevent its removal.

The measure of damages for cutting and removing ice under such circumstances is the value of the ice as soon as it exists as a chattel, that is, as soon as it has been scraped, ploughed, sawed, cut and severed, and is ready for removal.

ACTION of trespass *quare clausum fregit*, brought in the Circuit Court of Cook county, by Shortall, against the Washington Ice Company, for cutting, removing and appropriating, in January and February 1879, a quantity of ice which had formed on the bed of the Calumet river, within the limits of plaintiff's land in Cook county.

Defendant pleaded the general issue and *liberum tenementum*.

On the trial, the patent from the United States to Laframbois

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and Decant, was introduced in evidence, showing that there was no restriction or reservation by the government, and that the *locus in quo* was embraced in the 125 31-100 acres the patent conveyed. Under this patent plaintiff derived title.

From the evidence it appeared that the call of 125 31-100 acres contained in the patent, required that the bed of the river should be included to make that quantity; that the Calumet river extended from Lake Michigan westward, past the plaintiff's premises, where it is between 165 and 200 feet wide, and is, in fact, a navigable river; that the defendant company owned ice-houses on their own property in the next lot east of plaintiff's; and that in operating on the ice, it did not go on the plaintiff's land save as it entered upon the ice; that it first gathered the ice in front of its own land from the river, and then commenced to take the ice opposite the plaintiff's premises.

The court, at plaintiff's request, instructed the jury that the plaintiff was the owner of the whole bed of the river flowing through his premises; that when the water became congealed, the ice attached to the soil constituted a part thereof, and belonged to the owner of the bed of the stream, and that he could maintain trespass for the wrongful entry and taking the ice; and that the measure of damages in case of a finding for plaintiff, would be the value of the ice as soon as it existed as a chattel, that is, as soon as it had been scraped, ploughed, sawed, cut and severed and ready for removal.

Defendant excepted to the giving of such instructions, and asked the court to instruct the jury, that a riparian owner on the bank of a river navigable in fact, has no property in the ice formed in the midst of the stream where he has done nothing to pond or separate it; but that any person might, as against such riparian owner, where he could gain access without passing over the shore or banks of the owner, enter upon the ice and remove the same without cause of action or damage to such riparian owner; and that if such access as above stated, had been gained, then at most plaintiff could recover but nominal damages, even if the action of trespass be sustained. This instruction was refused; and defendant excepted.

A verdict and judgment were rendered in favor of plaintiff for \$562.40, which judgment, on appeal to the Appellate Court for the First District, was affirmed, and defendant appealed to this court.

Francis H. Kales, for appellant.

Joseph Wright, for appellee.

The opinion of the court was delivered by

SHELDON, J.—It may be well to inquire first, whether plaintiff, as riparian proprietor of both sides of the Calumet river, is the owner of the bed of the stream within the limits of this land. By the common law only arms of the sea, and streams where the tide ebbs and flows, are regarded navigable. The stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it to its centre; and the only right the public has therein is an easement for the purpose of navigation. Chancellor KENT, in his commentaries, declared it as settled that grants of land bounded on rivers, or upon the margins above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it: Vol. 3, Com. 427–8. And this title to the middle of the stream includes the water, the bed and all islands: 2 Hilliard Real Prop. 92; Angell on Watercourses, sect. 5.

This rule of the common law has been adopted in this state, and is here the settled doctrine. It was so held in *Middleton v. Pritchard*, 3 Scam. 510, and *Houck v. Yates*, 82 Ill. 179, with regard to the Mississippi river where it bounds this state. In *Braxon v. Bressler*, 64 Ill. 488, as to Rock river; *City of Chicago v. Laftin*, 49 Id. 172, and *City of Chicago v. McGinn*, 51 Id. 266, in regard to the Chicago river.

The Calumet river, then, being non-tidal, and plaintiff owning lands on both sides of it, he is the owner of the whole of the bed of the stream to the extent of the length of his lands upon it.

The next question respects the ownership of ice formed over the bed of the river passing through the land.

It is objected to by defendant that water in a running stream is not the property of any man; that no proprietor has a property in the water itself, but a simple usufruct while it passes along. But

manifestly different considerations apply to water in a running stream when in a liquid state and when frozen.

In *Agawam Canal Co. v. Edwards*, 36 Conn. 497, it is said : "The principle contained in the maxim, '*cujus est solum, ejus est usque ad cælum*,' gives to a riparian owner an interest in a stream which runs over his land. But it is not a title to the water; it is a usufruct merely, a right to use it while passing over the land. The same right pertains to the land of every other riparian proprietor on the same stream and its tributaries; and as each has a similar and usufructuary right, the common interest requires that the right should be exercised and enjoyed by each in such a reasonable manner as not to injure unnecessarily the right of any other owner, above or below."

In *Elliot v. Fitchburg Railroad Co.*, 10 Cush. 191, SHAW, C. J., says: "The right to flowing water is now well settled to be a right incident to property in the land; it is a right, *publici juris*, of such character, that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no large appropriation of the water running through it is made, then a just and reasonable use of it cannot be said to be wrongful or injurious to a proprietor lower down. * * * Still, the rule is the same, that each proprietor has a right to the reasonable use of it for his own benefit for domestic use, and for manufacturing and agricultural purposes."

In *Rex v. Wharton*, 12 Mod. 510, HOLT, C. J., says: "If a river run contiguously between the land of two persons, each of them is of common right owner of that part of the river which is next his land." Hilliard says, "that a watercourse is regarded in law as a part of the land over which it flows:" 2 Hilliard Real Prop. 150.

It will thus be seen that the riparian owner, as such, has rights with respect to the water in a running stream; he has a right of use, which right authorizes the actual taking of a reasonable quantity of the water for his purposes. The limitation in extent of the use of the water is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by a lower or upper proprietor

as it passes along his land. The only opposing rights are such rights of the public and such upper and lower proprietors. But when the water becomes congealed and is in that state, these opposite rights are in nowise concerned. The ice may be used and appropriated without detriment to the right of navigation by the public, or to other riparian owners' right of use of the water of the stream, when flowing over their land. The just and reasonable use of the water which belongs to the riparian proprietor, would be, in such case of congealed state of the water, the unlimited use and appropriation of the ice by him, as it would be no interference with rights of others.

We are of opinion there is such latter right of use, and that it should be held property of which the riparian owner cannot be deprived by a mere wrongdoer. When water has congealed and becomes attached to the soil, why should it not, like any other accession, be considered part of the realty? Wherein, in this regard, should the addition of ice formed over the bed of a stream be viewed differently from alluvion, which is the addition made to land by the washing of the sea or rivers? We do not perceive why there is not as much reason to allow to the riparian owner the same right to take ice as to take fish, which latter is an exclusive right in such owner. In *McFarlin v. Essex Co.*, 10 Cush. 309, SHAW, C. J., remarked: "It is now perfectly well established as the law of this Commonwealth, that in all waters not navigable in the common-law sense of the term, that is, in all waters above the flow of the tide, the right of fishing is in the owner of the soil upon which it is carried on, and in such rivers that the right of soil is in the owner of the land bounding upon it. If the same person owns the land on both sides, the property in the soil is wholly in him, subject to certain duties to the public; and if different persons own the land on opposite sides, each is proprietor of the soil under the water to the middle thread of the river." "The riparian proprietor has the sole right, unless he has granted it, to fish with nets or seines in connection with his own land:" Ang. on Watercourses, sect. 67. In *Adams v. Pease*, 2 Conn. 481, it was held that the owners of land adjoining the Connecticut river above the flowing and ebbing of the tide, have an exclusive right of fishing opposite to their land to the middle of the river, and that the public have an easement in the river as a highway for passing and repassing with every kind of water craft. So seaweed

thrown upon the shore belongs to the owner of the soil upon which it is cast: *Eman v. Turnbull*, 2 Johns. R. 313.

The exclusive right in the owner to take the ice formed over the land is an analogous right to those other ones which are acknowledged to exist in the subjects which have been mentioned and may, with like propriety, be recognised. It is connected with, and in the nature of, an accession to the land, being an increment arising from formations over it, and belonging to the land properly, as being included in it, in its indefinite extent upwards. Ice, from its general use, has come to be a merchantable commodity of value, and the traffic in it quite an important business. It would not be in the interest of peace and good order, nor consist with legal policy, that such an article should be held a thing of common right and be left the subject of general scramble, leading to acts of force and violence. In reference to the rule which we here adopt, of assigning to the owner of the bed of a stream property in the ice which forms over it, we may well use as fitly applying to it the language of HOSMER, J., in *Adams v. Pease*, *supra*, in speaking of the common-law rule as to the right of fishing, viz.: "The doctrine of the common law, as I have stated it, promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner." In accordance with these views, we hold, as it was held in *State v. Pottmeyer*, 33 Ind. 402, that when the water of a flowing stream, running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land and belongs to the owner of the bed of the stream, and he has the right to prevent its removal. See, further, relative to the subject, *Myer v. Whitaker*, 55 How. Pr. Rep. 376; *Lorman v. Benson*, 8 Mich. 18; *Mill River Woollen Manf. Co. v. Smith*, 34 Conn. 462; *Brown v. Bowen*, 30 N. Y. 519.

Defendant claims that it committed no trespass in taking the ice, because the ice in the midst of a stream navigable in fact is naturally an obstruction to navigation, and that any one has the right, having obtained access independent of the riparian owner, to enter upon the ice and remove it. We said in *Braxon v. Bressler*, above cited, "where the river is navigable, the public have an easement, or a right of passage upon it as a highway, but not the right to remove the rock, gravel or soil, except as necessary to the enjoyment of the easement." The same is said as to the ice here.

But it was not removed as necessary for the enjoyment of the public easement of navigation,—it was for the purpose only of the appropriation of it for defendant's gain.

As to the instruction as to the measure of damages, we think the case is analogous to those where coal is taken from the soil, and that the instruction is sustained by former decisions of this court in those cases: *Ill. & St. L. Railroad Co. v. Ogle*, 92 Ill. 353; *McLean Coal Co. v. Lennon*, 91 Id. 61; *Ill. & St. L. Railroad Co. v. Ogle*, 82 Id. 627; *McLean Coal Co. v. Land*, 81 Id. 359; *Robertson v. Jones*, 71 Ill. 405. Perceiving no error in the giving or refusing of instructions by the Circuit Court, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

By the common law, the limit of exclusive private ownership on waters where the tide ebbed and flowed was high water mark; and, except as modified by statute or custom, such appears to be the rule in the United States. See Cooley on Torts 321, and cases cited. As to rivers above the ebb and flow of the tide, but navigable in fact, such as the Mississippi and other large rivers, there is some difference of opinion. By the common law, the title of the riparian owner on a stream above tide-water *prima facie* extended to the centre of the stream; and this rule has been held in this country to apply to such rivers as the Detroit, the Delaware, the Connecticut, the Mississippi, the Milwaukee, the Sault St. Marie, the Saginaw, the Sandusky, the Chicago, Rock River, and many others: *Lorman v. Benson*, 8 Mich. 18; *Rundle v. Delaware, &c., Canal Co.*, 1 Wall., Jr., 294; *Hart v. Hill*, 1 Whart. 124; *Adams v. Pease*, 2 Conn. 481; *Morgan v. Reading*, 11 Miss. 366; *Magnolia v. Marshall*, 39 Id. 110; *Schurmeier v. St. Paul, &c., Railroad Co.*, 10 Minn. 82; *Houck v. Yates*, 82 Ill. 179; *Arnold v. Elmore*, 16 Wis. 509; *Ryan v. Brown*, 18 Mich. 196; *Bay City Gaslight Co. v. Industrial Works*, 28 Id. 182; *Gavit v. Chamaers*, 3 Ohio

496; *Chicago v. Loftin*, 49 Ill. 172; *Brazon v. Bressler*, 64 Id. 488.

On the other hand, in Iowa, North Carolina, Missouri, Pennsylvania, and perhaps in other states, it has been held that the soil under rivers navigable in fact, though not subject to the ebb and flow of the tide, does not belong to the riparian owner, but to the state: *McManus v. Carnichael*, 3 Iowa 1; *Tomlin v. Dubuque, &c., Railroad Co.*, 32 Id. 106; *Houghton v. Chicago, &c., Railway Co.*, 47 Id. 370; *Musser v. Hershey*, 42 Id. 356; *State v. Glen*, 7 Jones (Law) 321; *Wilson v. Forbes*, 2 Dev. 30; *Benson v. Morrow*, 61 Mo. 345; *Hickey v. Hazard*, 3 Mo. App. 480; *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. 71; *Carson v. Blazer*, 2 Binn. 475. The same rule has also been laid down by the Supreme Court of the United States: *Barney v. Keokuk*, 94 U. S. 324; *Railroad Co. v. Schurmeir*, 7 Wall. 272.

In those states where the title of the riparian owner extends to the centre of the stream, in running out the side lines of his property, they are to be extended from their respective *termini* on the shore, at right angles with the general course of the river, to the centre of the stream, unless otherwise established by the terms of the grant or conveyance under which

he holds: *Knight v. Wilder*, 2 Cush. 198; *Clark v. Campau*, 19 Mich. 325. And the boundary-lines of water lots fronting on a river in such a manner that their side lines strike the shore at a right angle with the middle thread of the stream, but at a different angle with the shore at that point, extend into the river at a right angle with the thread of the stream, without reference to the shape of the shore: *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182.

Where the common-law rule prevails, the right of the owner to the land under the water is subject only to the public easement of navigation and the right of improvement for that purpose: and he may make any beneficial use of his right that the nature of the property will admit without injuring the rights of the public. Thus, in *Lornan v. Benson*, 8 Mich. 18, it was held that the right to raft logs down the Detroit river did not involve the right of booming them upon private property for safe keeping and storage; and that, the owner of the bank being entitled to every beneficial use of the soil under the river which could be exercised with a due regard to the public easement, such obstruction which prevented his taking ice gave him a right of action in trespass for the damages thereby occasioned.

So, as held in *The State v. Pottmeyer*, 30 Ind. 287; s. c., 33 Id. 402, and in the principal case, it follows, as a legitimate consequence of the rule, that the ice upon the surface of the stream constitutes a part of the land, and may be taken exclusively by the riparian owner. See, also, *Cummings v. Barrett*, 10 Cush. 186. The owner of the fee of land adjoining a canal has also been held en-

titled to take ice therefrom, if the taking does not interfere with navigation or the use of the water for hydraulic purposes: *Edgerton v. Huff*, 26 Ind. 36. In *Mill River Woollen Manufacturing Co. v. Smith*, 34 Conn. 462, and *Myer v. Whitaker*, 55 How. Pr. 376, the owner of water in a mill-pond was held entitled to the ice as against the owner of the land. In both of these cases, however, the plaintiffs owned the water of the ponds, having acquired by contract the exclusive and absolute right to use the same as against the owner of the land or those claiming under him, and the cases are to be distinguished by this fact from those above cited.

In Missouri, where it is held that the soil under rivers navigable in fact does not belong to the riparian proprietor, it was held that a person who had surveyed, marked and staked off ice upon the Mississippi river, unappropriated by another, and who had expended money to preserve it and make it valuable for use as a commercial commodity, had a possession sufficient to support an action of trespass against one who with force and arms drove him and his servants away, and took and carried away the ice: *Hickey v. Hazard*, 3 Mo. App. 480. See, also, *Hittinger v. Eames*, 121 Mass. 539. And, doubtless, in that and other states where the rights of the riparian proprietor do not extend to the ownership of the soil under the water, the doctrine of the principal case will have no application; but where the common-law rule as to non-navigable rivers has been adopted, the rule of the principal case will doubtless prevail.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Tennessee.

HENRY J. LYNN ET AL. v. M. T. POLK ET AL.

An Act of the Tennessee legislature to settle and compromise the bonded indebtedness of the state, which provided for the issuing of new bonds, the coupons on which should be receivable in payment of all taxes and debts due the state, except for taxes for the support of the common school fund, is unconstitutional.

The courts cannot enjoin the execution of a statute to fund a public debt because of alleged bribery of members of the legislature to pass it.

Where a statute forbids suits against a state or any of its officers, to reach the state, it does not prevent a taxpayer from enjoining an officer who is about to issue the bonds of the state in pursuance of authority conferred by an unconstitutional enactment.

APPEAL from the decree of the chancellor dismissing a bill filed by a number of citizens and taxpayers against the secretary of state, the comptroller of the treasury, and the state treasurer, constituting "The Funding Board." The bill set forth, that on April 5th 1881, the legislature of Tennessee passed an act entitled, "An Act to compromise and settle the bonded indebtedness of the state of Tennessee," which provided for funding the bonded indebtedness of the state with past due interest up to July 1881, by new bonds, to be issued through the agency of a "Funding Board." These bonds were to be coupon bonds, bearing interest at the rate of three per cent. By the 3d section it was provided, "that the coupons on said compromise bonds, on and after their maturity, shall be receivable in payment for all taxes and debts due the state, except for taxes for the support of the common school fund, and said coupons shall show upon their face that they are so receivable."

By section 5, it was provided, that the secretary of state, comptroller and state treasurer should constitute a board, to be designated a funding board, which was authorized when any legally issued bonds of the state or coupons were presented to it, to examine and audit the same, and if found genuine, to prepare and deliver to the holders compromise bonds, taking up the old bonds.

On May 25th 1881, complainants filed their bill against the Funding Board, alleging that the passage of the act was procured by fraud and bribery, and that the act itself was unconstitutional, and praying for an injunction to restrain respondents from issuing the compromise bonds. The chancellor dismissed the bill, and an appeal was taken from his decree.

Henry Craft, A. S. Marks, David Campbell, N. N. Cox, George Gantt, S. A. Champion, T. A. Tulliaferro and John J. Vertrees, for complainants. ;

Thomas H. Mahone, William M. Smith, Ed. Baxter, Spl. Hill, R. McPhail Smith and David Bright, for respondents.

A separate opinion was delivered by each of the judges. The one given below is by

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McFARLAND, J.—The object of the bill is to prevent the execution of an act passed by the General Assembly on the 5th of April, authorizing the funding by the issuance of new bonds of much the larger part of the present bonded indebtedness of the state. The aggregate of the new bonds thus to be issued, it is said, will be about twenty-seven millions of dollars.

Among other things, the bill charges that suits were pending against certain railroad corporations of the state, brought by holders of Tennessee bonds, claiming a lien on the roads, and that during the session of the last General Assembly a conspiracy was formed between said bondholders and said railroad corporations to procure the passage of the act in question, with the understanding that in such event the bonds would be funded and the suits against the railroads dismissed, and that for the purpose of carrying out this scheme a large and powerful lobby was organized and supplied with large sums of money and bonds, to corrupt and control the legislature, and procure that body to pass the law in violation of their pledges to the people and of the people's wishes, and that various improper influences were brought to bear upon members of the legislature, and that the final passage of the bill through the senate by a majority of one vote was procured by bribing two of the senators who voted for it, one receiving \$10,000 and the other \$15,000 for his vote.

The question is whether this court has jurisdiction of this question. I am satisfied, upon the most careful consideration, that it has not. This seems to be manifest from the organization of our form of government. The government of the state is divided into three departments—the Executive, Legislative and Judicial. The three combined represent the entire sovereignty of the state. Powers vested exclusively in one department cannot be rightfully exercised by the other. The legislative power is certainly vested in the General Assembly, and it is certain that the courts can exercise no part of the power, nor can either of these departments rightfully determine with what degree of fidelity the other has met its obligations. For this court to exercise the jurisdiction would be to assume that the co-ordinate departments of the government are liable to corruption, but the courts are not.

If we were to take jurisdiction and determine that this act was passed by bribery and corruption the legislature would have the same right to inquire whether or not our judgment was procured by the same means. These departments within their spheres are so far omnipotent that they possess all the power of the state belonging to that department, and in the exercise of these powers they are independent, neither being subject to the will or supervision of the other.

The members of the General Assembly, like the members of this court, are responsible to the people who elected them for the manner in which they discharge their trusts, and they may be impeached in the manner pointed out by the Constitution. The people may relieve themselves of the consequences of the corrupt and faithless acts of their representatives, but it was never contemplated that one department should sit in judgment upon the conduct of the other. If so we might set aside pardons granted by the executive upon the ground that they were corruptly granted, and the executive department might in turn refuse to permit our judgments to be executed upon the ground

that they were corruptly rendered, and from the collision and conflict, confusion and chaos would result. If we should take jurisdiction of this question, and an issue of fact be formed, it would then have to be tried upon the rules of testimony applicable to civil cases, only a preponderance would be necessary to establish the allegations of the bill, or, as held by a majority of this court, only a slight preponderance, so that if it be shown by a slight preponderance of testimony that one of the senators who voted for the bill was corrupted, we would then be compelled to declare that the act was not the will of the legislature, although it could not appear that the bribed member would not have voted for the bill, notwithstanding the bribe, and although the bill was passed with all the forms of the law.

And besides this result would be reached in a case to which neither the state or the impeached member is a party or has the right to be heard and where we would have no right to consider whether improper influences may have affected the other side of the controversy.

The ground upon which courts set aside unconstitutional laws, as we shall hereafter see, is wholly different. In such cases the courts simply determine whether there is conflict between the two laws—the constitutional and the legislative acts—and if so, the former must prevail.

The remedy when the passage of a law has been improperly obtained is to repeal it either by the same or by some succeeding legislature, and the wrong sustained in the meantime is generally not irreparable, and besides the remedy by repealing the law can be more promptly applied by the legislature than by the court. The correctness of this view as to ordinary legislation is conceded by the counsel for the complainants, but it is insisted that, as to contracts entered into by the legislature in behalf of the state, the rule must be different; that when a state contracts she lays aside her sovereignty and contracts as an individual, and all the consequences must result—that is to say, as the contracts of individuals may be set aside for fraud, the contracts of states are subject to the same rule. When courts acquire jurisdiction of contracts made by states they apply the same rules of construction to the state they do to the individual; give the same measure of justice to each. But it is a mistake to assume that in making contracts the state lays aside her sovereignty so as to give the courts jurisdiction without her consent to adjudge her liability. The state needs no such assistance from the courts. If the legislature has been bribed and corrupted to assume obligations that the state does not rightfully owe, the remedy is, in the first place, to repeal the law before the contracts are complete. This power with respect to the present law is now fully possessed by the governor and legislature. If satisfied that the law was procured by bribery it is a question for the consideration of the governor as to whether or not he will call the legislature together on the subject, and for that body to determine whether for this or for any other reason the law should be repealed. It does not meet the question to say that they will not perform this duty; they have the power, we have not.

And even after the law had been executed and the bonds issued, if it should appear that by corruption and bribery an unjust debt has been assumed in the name of the state, its good faith and honor would not require the obligation to be met, and whether it would or not would be a question for the people through their representatives to consider, as the

state is sovereign and cannot be coerced, so that whether future legislatures would recognise the obligation would be a question for them, and the people in their sovereign capacity need no relief from the courts.

But it is said that on account of a peculiar provision of the act known as the "coupon feature" it will, when executed, be irreparable, and the state for reasons hereafter to be considered then without remedy, and hence unless the courts now interfere the obligations entered into under a law thus enacted will be fastened upon the people and no means left by which they can resist them. I will consider this question when I come to the constitutionality of the "coupon feature," and it will then appear that in my view there is a remedy against such an emergency, but not the remedy we are now considering.

To assume the jurisdiction now insisted upon would not only be, as I think, wholly unauthorized upon principle, but directly in the face of all the judicial opinions that have been expressed upon the subject, which, considering the sources from which these opinions have emanated, it would be bold if not rash to disregard. I refer to Chief Justice MARSHALL in *Fletcher v. Peck*, 6 Cranch 87; *Sunbury & Erie Railroad Co. v. Cooper*, 33 Penn. St. 283; *Wright v. Defrees*, 8 Ind. 298; *McCulloch v. The State*, 11 Id. 424; *Ex parte Newman*, 9 Cal. 515; *Slack v. Jacob*, 8 W. Va. 612; *State v. Hays*, 49 Mo. 604; *People v. Draper*, 15 N. Y. 532.

There is scarcely to be found an intimation to the contrary. Whether a bill may be maintained to restrain individuals or corporations from receiving the benefits of their own fraud practised upon the legislature need not be considered, as I do not think this bill can take that shape as the bondholders or those supposed to be benefited by the law are not parties—the Funding Board only being defendants.

I come now to consider whether the act violates the Constitution of the state. Several objections have been taken to it on this ground, but the argument has been addressed mainly to what is known as the "coupon feature" of the act, and the question, in importance, undoubtedly overshadows all others. The bonds authorized by the act, as I have said, will aggregate twenty-seven millions of dollars. They are to run for ninety-nine years from the 1st of July 1881, redeemable at the pleasure of the state at any time after five years; they are to bear interest at the rate of three per cent. per annum, evidenced by coupons payable semi-annually in New York.

The third section provides that the coupons on and after the maturity shall be receivable in payment of all taxes and debts due the state, except for taxes for the support of the common schools and the payment of the interest on the common school fund, and said coupons shall show upon their face that they are so receivable. The ninth section enacts that the bonds shall be substantially in the form there set out. The form of the bond there set out contains this provision, to wit, "The coupons of the bonds as they become due are receivable for all taxes and debts due the state of Tennessee." I will not stop to consider the effects of the discrepancy between the third section and the form of the bonds set out in the ninth section, the former making the coupons receivable for all taxes and debts, with certain exceptions, the latter making them so receivable without exception. I will assume that the

third section is to prevail. The purpose of these provisions is manifest. The stipulation that the coupons are receivable for taxes and debts due the state, especially as incorporated into the bonds and coupons themselves, will, if valid, constitute part of the contract, and will be within the protection of the clauses of the Constitution of the United States prohibiting states from passing laws impairing the obligation of contracts, a provision which the federal courts have jurisdiction to enforce, and this notwithstanding the Constitution of the United States denies to those courts jurisdiction of such suits directly against the states. The federal courts take jurisdiction of the officers of the state and enforce this provision of the Constitution, notwithstanding the contract to be enforced be the contract of a state and the state be the real party in interest.

This is the well-settled law of the Supreme Court of the United States: *Osborne v. U. S. Bank*, 9 Wheat. 738; *Dodge v. Woolsey*, 18 How. 331; *Banks v. Debolt*, Id. 300; *Furman v. Nichol*, 8 Wall. 44; *Hartman v. Greenhow*, 12 Otto 672; *Davis v. Gray*, 16 Wall. 203, and many other cases, so that if the act be within the power of the legislature and the bonds be issued, the provision in regard to the receivability of the coupons for taxes and debts due the state cannot be repealed so as to affect the holder's right during the ninety-nine years, or so long as any coupons remain unpaid, and any attempt to so repeal must be declared inoperative and void by the courts of the state in obedience to the mandate of the federal courts. The holders of the bonds and coupons, therefore, would have this security, that so long as each successive legislature shall levy any tax, especially any tax over and above taxes for the support of common schools and interest on the school fund, they would have the prior right to appropriate it before it reached the treasury by tendering the coupons in payment. The result, therefore, would be that no future legislature could, on any account, omit to levy the necessary tax to pay the outstanding coupons in addition to the current expenses and other debts of the state, and besides, when so levied, the holders of the coupons would have a prior claim on the whole fund, and whatever loss or delay might occur would fall or be liable to fall upon the other current expenses and debts of the state. Future legislatures would have no other alternative unless they refused to levy the necessary taxes to support the government. In short, the effect of the act is to place the question of the payment of these coupons and the manner of their payment beyond the control of any future legislature or even of the people themselves in convention assembled for ninety-nine years, if any portion of the coupons remain unpaid so long, and to take from such legislature all right to control the revenues raised by them to the extent of the sum necessary to pay the coupons or over eight hundred thousand dollars annually, and further to vest in the federal court jurisdiction to enforce the demand. The objection is not to the power of the legislature to make by law coupons receivable for taxes. This power is not denied. The objection is to the power to stipulate by contract that the law shall not be repealed. The question is, has one legislature the power to make such a stipulation binding upon any future legislature? I do not favor the doctrine that courts may declare acts of the legislature void upon the idea that they violate in some general and undefined

way the principles of republican government. I also adhere to the doctrine that in general state constitutions are to be construed as limiting and restricting, but not as granting legislative powers. If the power be in its nature legislative, then it belongs to the legislative department, unless some limit or restriction be found either in the letter or spirit of the Constitution. And in applying these limits and restrictions I have never been disposed to "stick in the bark," or to be too literal or hypercritical in construing the Constitution. But when I regard a vital principle violated, then I deem it my duty to declare the act inoperative, without resorting—out of mere deference to the legislature—to extreme or refined subtleties to sustain it.

I take it to be a sound and well-recognised principle, plainly deducible from our Constitution, that the legislative power vested in each General Assembly as the representatives of the people to legislate upon any subject, is limited to the two years for which they are elected, and it is clearly beyond their power to enact any law on any subject that may not be repealed by the same or any subsequent General Assembly. This I take to be a self-evident proposition, and one that will not be denied. One generation cannot legislate for the next.

The people through their representatives have at all times the right to change their laws to meet the exigencies as they arise.

But while this is admitted it is maintained that legislative enactment may also involve elements of contract that cannot be changed at the will of the sovereign power. The laws may be repealed but the obligation of contracts cannot be impaired.

Irrepealable laws may not be passed, but states may make contracts obligatory upon the people in the future. This is beyond question. By the custom of civilized nations they have the right to contract public debts not only obligatory upon the people who contract the debt, but upon future generations, otherwise they might in times of war be unable to preserve the life of the nation itself. But states in creating such debts act as sovereigns and cannot be coerced into payment. The faith, honor and credit of the state and of the people are pledged for the payment of the debt, but the people through their representatives in each successive legislature must be left to redeem their part of the pledge. It is not contended that there is any mode to coerce the state into the payment of an ordinary bond—I mean one without the "coupon feature;" but it is equally certain, as has been shown, that there is a mode by which payment of coupons of the character we are considering may be enforced.

The provision in regard to the coupon is not only a law regulating the collection and disbursement of the revenue and the conduct of the state officers, but under the construction put upon similar provisions by the Supreme Court of the United States it becomes part of the contract. The question, therefore, is: Can one legislature, in the form of a law, make a contract which surrenders the power of future legislatures to enact laws for the public good? Can one legislature surrender those attributes of sovereignty which are absolutely necessary not only to the well-being of the state but to its very existence? Stated in this form there can be but one answer. No such power can or ought to exist. The power from time to time to enact such laws for the public good, as may then appear necessary, is an essential element of sovereignty abso-

lutely necessary for the existence and well-being of the state and cannot be surrendered. But it is said if this proposition be carried to its full length it denies to the state the power to issue bonds in any form. That the power to bind the state by the "coupon feature" of the law is no higher power than to issue an ordinary bond. That in each case the faith, honor and credit of the state and its future revenues are pledged for the payment of the principal and interest of the debt, and nothing beyond this in either case. If the power exists to make one form of bond, it must exist to make the other, as the power to provide the manner of payment must be co-extensive with the power to create the debt. If the obligation contained in the "coupon feature" be allowed to stand upon the same basis as the bond without this feature, that is upon the faith and honor of the state, and bear the same construction, then this assumption might be correct. When questions of this character were first brought before the Federal court, it was insisted that the clause of the Federal Constitution prohibiting states from passing laws impairing the obligations of contracts, related to contracts of individuals, and that mere legislative acts of the state should not be construed as contracts which the Federal courts were vested with jurisdiction to enforce against the states, especially when by the Constitution the court could not take jurisdiction directly. Had this construction prevailed, then the form of obligation entered into by the state would not be very material. The state being sovereign could not be coerced to perform the obligation in either event, and, in making such contract, no higher power would be exercised in the one case than the other. But, as we have seen the decision of the question was otherwise, it was held that when provisions like the present are enacted, as to the manner of payment, the Federal court will take jurisdiction of the state's officers and enforce the law, as a contract, denying the state all right to repeal or impair it, and virtually in that event the state ceases to be sovereign in respect to her own obligations, and hence in making such contracts the state has surrendered her rights not only to act as a sovereign with respect to her own obligations, but also to enact such laws as may incidentally affect them. And we must bear in mind that by the construction thus given to acts similar in this respect to the coupon feature of this act, the law out of which the contract results becomes irrepealable. The difference, therefore, between the two characters of bonds is this: The ordinary bond pledges the honor and faith of the state; each successive legislature as the representative of the people is left to meet its part of the obligation; in doing so they act from the sense of honor and good faith which is supposed to actuate the people of a sovereign state and their representatives. It is for them to determine what honor and good faith require, but there can be no power to coerce their action. They are not bound by previous legislation further than honor and good faith require they should be bound, and of this they are to judge. By the issuance of the ordinary bonds the power to legislate in the future for the public good is in no sense relinquished. On the other hand, the bonds with the coupon feature not only pledge the honor and faith of the state, but practically take the matter entirely out of the control of the people or any future legislature, while the obligations last, not only as to the question whether the coupons shall be paid, but also as to the manner of their payment. The revenues to be raised by

future legislatures are to this extent not only pledged but actually appropriated and put beyond their control. To this extent they are deprived of all power of legislating on the subject. So it is apparent that the powers exercised in the two cases are essentially different. Had the legislature the power by contract to place the coupon provision of the laws absolutely beyond repeal while the coupons remain unpaid? It is said the question can never arise unless we suppose that future legislatures may disregard their obligations and refuse to levy the necessary taxes to meet the interest on the debt and other expenses of the state. Without this the necessity for a repeal can never exist, and it cannot be presumed that they will thus disregard their duty. I agree that we are to predicate no argument upon a presumption that any future legislature will violate its duty or act in bad faith. But the error of this argument is in the court assuming to decide that it will under all circumstances be the duty of every succeeding legislature to levy taxes to pay the coupons. This is not a question for the court. If a future legislature should become satisfied that the debt was unjust and fraudulent, procured by bribery and corruption, the honor and faith of the state would not require that it be paid. Of this the legislature would have to judge. It is said that this debt is an honest and just debt. If so, I trust the legislative department will always so recognise it. I certainly intend to express no doubt as to its validity, but the court has no jurisdiction to pass upon the question. The state as a sovereign power must determine for itself through its legislature the measure of justice that good faith requires it to render to its creditors.

Of course the state has the power to repudiate an honest debt, but we are to presume that the power will not be exercised. But, however just and honest this debt may be, if one legislature has the power thus to tie the hands of the future legislatures, as to the payment of honest debts, they may equally bind them for the payment of unjust debts. It is perhaps not impossible that legislatures may be bribed and corrupted to enter into obligations that ought not to be binding upon the people of the state. In such an event the state could not go into the courts to set aside its obligations upon the ground that its own legislature had been bribed and corrupted, and when the action of the Federal courts should be invoked to enforce the coupon contract and protect it from impairments, they would not listen to the charge that the state legislature had been bribed to make the contract, so that in such an event the state could practically no more resist the payment of a debt created by bribery than any other.

But aside from this, and assuming that no future legislature will ever doubt that this is a just debt, will it under all circumstances be their duty to levy taxes to pay the coupons? Public debts are to be paid by taxation; the creditor has no direct claim against the citizen. I do not undertake to define the extent to which the taxing power may go. But the right of the people and of the state to exist is superior to the claim of the creditor. The creditor who takes the bond of a sovereign government risks not only its honor and good faith but also the possibility that its debt may become too onerous to be borne. The government must exist, its people must live, otherwise all ability to pay debts would be destroyed, and whatever may be said of it, we know that upon the supposed want of ability to pay or for other cause the power to repudiate public debts, in whole or in part, has been frequently exercised in

modern times even by the most enlightened governments. These are infirmities attaching to all debts of this character.

But I am not to be understood as advocating the doctrine of repudiation or encouraging any tendency in that direction. I only assert that the right of the state to preserve its own existence and good government and the right of the people to support and maintain themselves is superior to the right of the creditor. This principle is recognised even in regard to private contracts, by our liberal exemption laws. In the event of war, famine or pestilence, is it possible that a legislature would not have the power to suspend the payment of these coupons, or postpone them to the superior demand for the preservation of the state and the people themselves? In such an event I do not think it can be denied that the power to repeal the laws would exist. We cannot know that such emergencies may not arise within the next ninety-nine years. It will not do to say that the legislature that passed this act determined that no such emergency would ever arise, and that it would never be necessary to repeal it; this is absurd.

It is said that such emergencies are improbable, extreme cases that may never occur, and that we need not now undertake to provide against them. True, we need not; but we must preserve in the government the power to provide for such emergencies if they should occur, the power to protect itself and its people in times of calamity and peril. Extreme cases may always be supposed in order to test principles. This is not arguing that the act in question may become unconstitutional upon such future contingency. The happening of such future contingency is referred to for the purpose of showing that the act was in excess of legislative power at the time it was passed. Then, if it be conceded that, under any emergency that may reasonably be supposed, the power to repeal the law would exist, then it seems to me to follow, inevitably, that the act which, according to the construction placed upon such acts, stipulates that it shall not be repealed was beyond legislative power.

It will not do to say that the legislature might make such a contract, but that we will annex to it the implied qualification, that upon sufficient emergency the law may be repealed and the contract impaired. This qualification necessarily destroys the whole contract. If the law may be repealed in any emergency, then who is to judge of the sufficiency of the emergency? Certainly not the courts; it cannot be said that the courts would uphold a repeal of the act if, in their opinion, it was upon an emergency justifying it, and disregard the repeal if the emergency was not deemed sufficient.

The considerations upon which the sufficiency of the emergency would have to be determined are not judicial in their character, but purely political and legislative. If then we consider that the sufficiency of the emergency is to be determined by the legislature, it inevitably results that they may repeal the law at pleasure and the contract is without validity.

But it seems to me, that if the power to make such contracts be conceded them, the right to repeal the law and abrogate the contract would not be recognised in any emergency. The question would come directly within the jurisdiction of the federal court. The decisions of that court, at least as they now stand, leave no room for doubt. They

say, if the state legislature makes the contract and has the power to make it, then it cannot be impaired by any subsequent legislation, and to ascertain the meaning of the contract, they disregard the construction of the state courts and construe it for themselves.

The court would not undertake to inquire into the circumstances of emergency or necessity under which the state legislature may have undertaken to repeal the law and impair the contract. It is said, however, that the jurisdiction is vested in that court, and whatever it might decide would be the law of the case, and we must presume they would decide correctly.

Jurisdiction is vested in that court to enforce the Federal Constitution against state laws impairing the obligations of contracts, and so it must determine whether the contract has been impaired. Their decisions are the supreme law upon this subject.

But whether our legislature has the power to bind the state by the contract, supposed to be impaired, is not a question for the Federal Supreme Court. This is a question depending upon the construction of our own Constitution and belongs to this court. If our Constitution denies to the legislature the power to make the contract, and this court so declare, I do not understand that the Federal Supreme Court has any jurisdiction to review our decision. It is certain that it would not if the law be declared unconstitutional, and the proposed contract without authority, in advance and its execution prevented, whatever it might decide in the event the question were to come up after the bonds are issued.

So, that when it is found that legislative acts of the character of this one are construed to be contracts by which the state is subjected to the jurisdiction of the federal court, and by which its sovereign power necessary for its own existence and well-being is surrendered, the state court is well justified in declaring that no power exists in the legislature to make such a contract.

The state must reserve to itself and to each succeeding legislature the sovereign power to protect itself, and to attend to its own local affairs; its legislature can surrender no power not already vested in the federal government. Again, assuming that the debt will always be regarded as a just debt and that no calamity will ever occur rendering the people for the time unable to meet the interest, that each successive legislature will be willing, in good faith, to discharge the duty of levying the necessary taxes, still, it might in their opinion be necessary for the public good to change the manner of payment, and repeal the coupon section, collect the taxes in money, and pay the coupons at the treasury. This might become necessary to prevent the various tax collectors in the state, many of whom are unskilled in business, from receiving counterfeit coupons. The delay in the collection of taxes, even when an ample amount is levied, may, on account of the prior claims of the coupon holders be found to operate unjustly to the other creditors of the state, and create embarrassments for want of funds to meet the current expenses. The legislature might desire to obviate this by levying a separate tax, payable in money to meet the current expenses, leaving an ample amount payable as before in coupons to take up all that remain outstanding.

Neither of these changes supposes any purpose to repudiate the debt.

They would be perfectly fair and just and not inconsistent with perfect good faith, yet if the contract be valid neither of these changes could be made. Such changes in the laws might be necessary for the public good, and yet the legislature of a sovereign state without the power to make them.

We cannot determine, nor was it in the power of the last General Assembly to determine, that these changes would never be necessary or important. It is a power constituting an essential element of sovereignty necessary for the purposes of government and cannot be surrendered, but must remain with the people and their representatives for the time being. The extent of the power is not important. If one essential element of sovereignty may be surrendered, why not all. Where is the limit?

It is argued, however, that for a consideration a legislature may relinquish part of the sovereign power, though not all. I know that this doctrine is established by numerous decisions of the Supreme Court of the United States with reference to provisions in charters of incorporation, by which, for a consideration, the right to levy taxes in the future has been held to be released.

We are bound by these decisions in similar cases, but we are not bound to apply the same doctrine elsewhere. The soundness of the doctrine has always been denied by some of the ablest judges of the Supreme Court, and has been met with solemn protests by some of the ablest state courts, and Mr. Justice MILLER has shown me one of his dissenting opinions that if the power be conceded to exist, no limit can be fixed to its exercise. These decisions must be left to stand upon their own peculiar ground, if, indeed, they stand upon any sound principles. I have carefully examined the case of *Antoni v. Wright*, decided by the Supreme Court of Virginia, 22 Grattan 833, and given to it the respectful consideration due to the courts of a sister state, but I cannot concur in the reasoning or the conclusion. I have already examined the grounds upon which it mainly rests.

The case of *Hartman v. Greenhow*, 12 Otto 672, did not present the question. The decision in *Antoni v. Wright*, afterwards re-affirmed by the same court, had been acquiesced in by the state officers of Virginia. The coupons in the latter case were not refused, the only effort was to deduct from them a tax upon the bonds. While the reasoning of the Virginia court is recited with apparent approval, yet it is manifest, the decision was regarded as settling the question, leaving only the question of the proposed tax to be decided in the latter case. The case of *Furman v. Nichol*, 8 Wall. 44, holds that the 12th section of the charter of the Bank of Tennessee, making its notes receivable for taxes was a contract attaching to the notes, that could not be impaired by subsequent legislation. The question, of course, has some analogy, but is not identical. The notes were intended to, and did for a time, at least, circulate as money. At all events, the question as to the power of the legislature to bind the state by contract like the present, was not considered or decided. The same may be said of *Woodruff v. Trapnall*, 10 How. 190.

The Supreme Court of the United States has not, in general, been disposed to question the power of state legislatures to make such contracts. I presume, as I have said, the construction of the state

Constitution as to the power would be a question for the state courts. Though in inquiring whether the contracts of a state have been impaired, the United States courts do not yield to the construction given by the state courts to the statutes, out of which the contract arises: *Jefferson Bank v. Shelley*, 1 Black 436; *Wright v. Nayle*, 11 Otto 794. We ought to entertain no feeling of antagonism toward the Federal Supreme Court. We should adopt its decisions where they are controlling without hesitation. We should not regard its decisions as those of a foreign jurisdiction. It is not to be denied that the extension of the jurisdictions of the federal courts over the states is, from a political standpoint, regarded with jealousy from some quarters, as indicating a tendency to encroach upon the rights of the states and strengthen the general government. In this contest it is not the province of this court to enter with anything of a partisan spirit. Upon this character of questions, however, Mr. Justice MILLER in a dissenting opinion, in which Justice FIELD and the Chief Justice concurred, in the case of *Washington University v. Rouse*, 8 Wall. 489, uses the language: "But we must be permitted to say, that in deciding the * * * validity of the contract, this court has been at times quick to discover a contract that it might be protected, and slow to perceive that what are claimed to be contracts are not so by reason of want of authority in those who profess to bind others."

This, he adds, has been especially apparent in regard to contracts made by legislatures of states. When it is seen that the result, in cases of this character is, by contract, to surrender to the federal court jurisdiction over the state itself in its local affairs, it cannot be wondered if, in view of the statement, state courts shall hereafter be a little slow to see the power to make such contracts. I trust, at this day, I have no special mania upon the subject of state sovereignty, but I cannot decline to assert so much of the powers of sovereignty as are yet conceded to the state.

It is said, however, the bill attacks the act upon the ground that the legislature cannot pass an irrevocable act, and hence this law is revocable, and at the same time assumes that the act is unconstitutional because it is not revocable. The argument is earnestly pressed, and it is insisted that the law is either revocable or it is not revocable; if it is revocable no relief is now needed, it will be for the legislature to repeal it at pleasure; if it is not revocable the complainants are entitled to no relief by their own showing. This, though ingenious, savors of "special pleading." If the section in question was only a law it would of course be revocable, but it involves also elements of a contract, and if the power exist to bind the state to these stipulations and the terms be accepted, then the contract could not be impaired. As to neither of these propositions can there be any doubt. Nor can there be any doubt under the decisions of the Federal Supreme Court that this is a contract. No difficulty can exist as to its construction and meaning. It was intended to prevent the repeal of the law. The question is not whether it is or is not a contract, or as to the meaning of the contract; but the question is whether the legislature had the power to bind the state to these stipulations. It is not an accurate statement of the position of the complainants to say that the act is unconstitutional because it is not revocable, but it is because it professes to authorize a contract

on behalf of the state which the legislature has not the power to make, that is, a contract relinquishing part of the sovereign power of the state. Of course, if the law be unconstitutional it may be so declared even after the bonds are issued, but it does not follow that it may not be so declared in advance. It is assumed that the question cannot arise until there is an attempt to repeal the law, as until then there is no real case. But this overlooks the fact that this is not only a law, but professes to be a contract. If the court has the jurisdiction, and the proper parties are before it, no doubt can exist as to the right to declare in advance the want of power to make the contract and prevent its consummation. If such jurisdiction exists, it would, in every view, be better to exercise it now rather than allow the bonds to be issued and afterward allow the coupon section to be repealed and the contract changed. Of course, we cannot know that the attempt would ever be made to repeal it, but the bonds, in the form proposed, would contain an unwarranted assumption upon their face, and be calculated to deceive and mislead innocent purchasers and make litigation. The Supreme Court of the United States enjoined the board of liquidation of Louisiana from issuing bonds of the state to certain persons, upon the ground that an act of the legislature authorizing it indirectly impaired the rights of the complainants under a former act; 2 Otto 531. In *Davis v. Gray*, the governor of Texas was enjoined from issuing grants to a large body of land, upon the ground that it would interfere with other titles: 16 Wall. 203, and there are various other cases holding that it is proper to grant the relief in advance: *Mott v. Pennsylvania Railroad*, 30 Penn. St. 9; *Bradley v. Com.*, 2 Humph. 428; *Winston v. T. & P. Railroad*, 1 Baxter 60. If this law in terms authorizes the defendants to enter into contracts in the name of the state, containing stipulations to which the state, under the Constitution, cannot be bound, then there ought to be no reluctance in so declaring, or any "straining of the timber" of the law to avoid the result. It may, no doubt, be thought that there are strong reasons why the court ought, if possible, to sustain the settlement. The state, it may be said, has large resources, the debt is not beyond our means, it has been a disturbing element in the state, the reputation of our people for honor and integrity is at stake, and the court ought from these considerations to resolve all doubts in favor of the law, brush aside all technicalities and abstractions and sustain the action of the legislature if possible, because it is a favorable settlement, and it is of great importance to the state that it should be sustained. To defeat this settlement of the public debt, is, I know, assuming a great responsibility. I certainly could not undertake to do so upon a mere technicality or abstraction. I cannot, of course, know that this law would ever injuriously affect the state, it might not; the burdens might be submitted to and borne without injury or complaint. But if it involves a vital principle of constitutional law, essential in its nature to the preservation of the state and the rights of the people, then this principle cannot be surrendered, upon the suggestion that in this instance it would do no harm, and that it is for a good purpose. A radical error, once established, may do incalculable injury. I cannot undertake to speculate as to the consequences. My duty is to respond to the question presented by the record. The political considerations are not for the court. It simply resolves itself at last into

the question whether the sovereign power of the people of this state to deal with their public debt, to raise revenue by taxation and appropriate it, and enact laws in regard to the manner of such collection shall remain with them and their representatives, as they shall from time to time assemble, or shall those powers be held to have been surrendered by the contract of one General Assembly for ninety-nine years, and the jurisdiction thereby vested in the federal court to coerce the state into the performance of the contract.

It must be remembered that if this contract be valid, the people of the state cannot change it even by a constitutional amendment. They cannot, even in this mode, impair the obligation.

The last General Assembly, actuated, no doubt, by a patriotic desire to redeem the honor of the state and do justice to its creditors, undertook to satisfy their demands by putting the obligation in such form that no future legislature could question the settlement or change the manner of payment. This feature of the law seems to have had its origin in a want of confidence in the integrity of the people and their future representatives. In this I think the legislature exceeded its power. The responsibility of making provision on the debt, the honor and good name of the state must be left with the people. If they, in an evil hour, should choose to violate their faith and bring reproach and dishonor upon themselves by repudiating debts that in justice they ought to pay, it will indeed be a sad calamity, but I am not to presume that such an event can ever occur. The people of this state cannot be guilty of so great a folly and so great a crime; but if they choose to do so I do not know how they shall be prevented. One legislature has no power to act upon such a presumption and bind the people by a contract which surrenders their sovereign powers.

It remains then to be seen whether the court has jurisdiction and the necessary parties to render a decree. It is argued with great earnestness and force that the court cannot take jurisdiction of this case, because it is in effect a suit against the state, or against "officers of the state, acting by authority of the state, with a view to reach the state."

The Constitution allows suits against the state in such manner as the legislature may provide, but as there is now no law providing for such suits it is conceded that they cannot be maintained. On the contrary, the Act of February 28th 1873, declares that no court in this state shall have jurisdiction "to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds or property."

We have decided quite a number of cases since this act was passed, awarding the process of mandamus against the comptroller to compel him to issue warrants against the state allowed by law: *Burch v. Buxter*, 12 Heiskell 601; *Publishing Co. v. Burch*, Id. 607; *Uhl v. Grimes*, 4 Lea 352, besides quite a number of unreported cases. The effect of the Act of 1873 seems to have been considered in those cases; but it would certainly not be construed to deprive the court of jurisdiction to compel a ministerial officer to perform a plain ministerial duty, and when the demand of the relator is allowed by law it is the plain ministerial duty of the comptroller to issue his warrants, even though in determining this question the court may have to declare the legislative acts unconstitutional. Otherwise, the decision of the comp-

troller would be final, and the party having a demand allowed by law without remedy. Such proceedings, so far from being suits against the state, are, in fact, suits in the name of the state to compel its officers to perform their duty.

There are cases, however, where the ministerial officer is vested with discretion in the discharge of his duties, a discretion which the courts cannot control. They may compel him to perform his duty, but may not determine how his discretion shall be exercised. The principle upon which mandamus is awarded against ministerial officers in such cases is not that the state is coerced, or its officers compelled to perform acts against the will of the state, but precisely the reverse. They are compelled to perform the will of the state as expressed by law—in general, the only manner in which it can be expressed. It is claimed that the defendants in this case are officers of the state, acting by authority of the state, and hence cannot be interfered with in the discharge of the duties imposed by the Act of 1881, without directly violating the Act of 1873, above set out.

The only evidence that they are, in this matter, acting by authority of the state, is the Act of 1881, under consideration; if it is out of the way then they have no authority. In that view, so far from their proposed acts being by authority of the state, they would not only be acting without authority, but in direct violation of the will of the state.

The state cannot be supposed to be standing behind its officer urging the execution of an unconstitutional law, especially when there is nothing to show this but the unconstitutional law itself, otherwise a void law for this purpose would be as effective as a valid law. But it is said the court cannot reach the question of the validity of the law—that the jurisdiction is defeated *in limine*.

It is true the court cannot take jurisdiction of the state for any purpose, but it has undoubted jurisdiction of the defendants. The objection to the exercise of the particular jurisdiction against them is that they are officers of the state acting by authority of the state. To determine this the court must look to their authority. It cannot accept their mere assumption. If the authority be wanting, or the law which they claim gives them the authority be void, then they are not acting by authority of the state. It is true they would have color of authority. A law is *prima facie* valid, but if the court can look far enough to see this much, they can look farther and see that it is in fact void. This rule is firmly established as respects the jurisdiction exercised by the Supreme Court of the United States in enforcing the clause of the federal constitution against state laws impairing the obligations of contracts, even where the contract to be upheld is the contract of the state. In such cases, although the state officers may be acting under the authority of a law of the state *prima facie* valid, and, although the 11th amendment to the federal constitution prohibits the suit against the state, yet the federal courts take jurisdiction of the officer, and if the law of the state under which he is acting be found to impair the contract embraced in any previous act, the former is declared void, and the officer is compelled to execute the law as the court may declare it. The court says that such are not suits against the state, although the state be the real party in interest: *Osborn v. Bank of U. S.*, 9 Wheat.

738; *State Bank of Ohio v. Knoop*, 16 Howard 369; *Dodge v. Woolsey*, 18 Id. 331; *Bank v. Debolt*, Id. 380; *Jefferson Bank v. Skelly*, 1 Black 436; *Davis v. Gray*, 16 Wallace 220; *Woodson v. Murdock*, 22 Id. 351; *Board of Liquidation v. McComb*, 2 Otto 531. In the latter case, the board of commissioners of Louisiana, of which the governor was a member, was restrained by injunction from issuing bonds of the state which were expressly authorized by an act of the legislature of Louisiana. They pleaded the authority of the act. The court said the state could not be sued, but that an unconstitutional law was no authority for the non-performance or violation of duty, but would be regarded as merely void. So, notwithstanding the act authorizing the bonds to issue, it was held to be the plain duty of the board not to issue the bonds, and one about which they had no discretion. So, in *Davis v. Gray*, *supra*, the Governor of Texas was restrained from issuing grants for land in the state, although expressly authorized by an act of the legislature *prima facie* valid. It is said, however, that these decisions only establish the rule of the United States courts when exercising the jurisdiction of that court to enforce the constitution and laws of the United States, that is to say, the clause prohibiting states from passing laws impairing the obligation of contracts; but when they exercise concurrent jurisdiction with the state courts dependent upon citizenship the rule is different.

In these cases first named, the rule must be the same in the state as in the federal courts. It is as much the duty of the state as the federal court to uphold the Constitution of the United States and declare void all laws impairing the obligation of contracts, and for this purpose to entertain suits against officers of the state. They cannot escape this duty by holding a suit against the officer to be a suit against the state. A judgment on this ground would be reversed by the federal Supreme Court, and by its mandate the state court would be required to enter a judgment against the officer. So that the argument insisted upon would lead us to this conclusion—In cases involving the provisions of both the state and federal constitutions against laws impairing the obligation of contracts, the rule would be, that a suit against an officer is not a suit against the state. If it involve any other provision of the state constitution the rule would be exactly the reverse. It would seem that, upon principle, the rule ought to be uniform. We have a number of cases in which officers and agents of the state have been restrained by injunction from carrying out laws which result in violating the Constitution, as for instance the establishment of new counties. The leading case on this subject is *Bradley v. Commissioners*, 2 Hum. 428, which has been repeatedly followed. (See also, *Mott v. Penna. Railroad*, 30 Penn. St. 9; also *Galloway v. Jenkins*, 63 N. C. 147; also *Winston v. T. & P. R. R.*, 1 Baxter 60.)

The cases, however, of *Bradley v. Commissioners*, *supra*, and others of a similar character, were before the Act of 1873, and the mandamus cases before referred to did not consider its effect.

This question was considered in the case of the *State v. Sneed*, 9 Baxter 472, in which it was held that the Act of 1873 deprived the court of jurisdiction by mandamus to compel the tax-collectors to receive the notes of the Bank of Tennessee issued after May 1861, in accordance with the 12th section of the charter. It will be found, however,

that the real ground upon which this decision rests is, that by another act of the same session, chapter 44, Acts of 1873, a new remedy was given, that is to say, to pay the taxes in money under protest, and sue the collectors to recover back the sum paid, and, in this view, chapter 13, of the Acts of 1873, did not impair the contract contained in the 12th section of the bank charter, and it was upon this ground the validity of the act was recognised by the federal Supreme Court. The Act of 1873, chapter 13, does profess to take away all jurisdiction against officers of the state in the cases named. The act was, no doubt, intended to protect the treasury and taxes of the state and its property, even against claims that might be valid. It was principally intended, no doubt, to protect the state from being compelled to litigate with the taxpayers as to their right to pay their taxes in the new issue of the Bank of Tennessee, and have the collection of taxes suspended by these suits. The necessities of government require summary remedies for the collection of revenue, and to secure this was the principal object of the act, and it may be that in some cases this court has extended the act to an unwarranted length in protecting state officers. I think it could not have been intended to deprive the citizens of all remedies in any case to protect themselves by injunction against the execution of unconstitutional laws by officers of the state.

The object is not to reach the treasury funds or property of the state, or to reach the state or interfere with its laws or the administration of its public affairs. It is precisely the reverse. It is to protect the treasury funds and property of the state, and to protect the state from the consequences of unauthorized acts about to be performed in her name. The only ground, I repeat, upon which it can be assumed that it is the will of the state that the bonds be issued, is the unconstitutional void law.

There are cases where executive officers are vested with sole discretion to determine the validity of the law under which they act, and where their action cannot be controlled by the court or its validity questioned afterwards. Such was the question of *Jonesboro Turnpike Co. v. Brown*, 8 Baxter 490.

There are other cases where, although the court will not control action, the same question may come before the court and be decided differently, such was the case of *Williams v. Register*, 1 Cooke 213. The executive department of the government cannot be delayed and embarrassed in the execution of the laws necessary to the administration of its affairs, until the constitutionality of the laws be determined by the courts: *Mississippi v. Johnson*, 4 Wallace 475.

The question of the constitutionality of this law is one ultimately for the courts. It cannot be held that the funding board were vested with exclusive jurisdiction to determine the validity of the law. Their decision could not, in the nature of things, be final. If they were to determine the law unconstitutional and refuse to issue the bonds, the court would, no doubt, have jurisdiction by mandamus, if it decided the law valid, to compel them to act. On the other hand, the court determining the law unconstitutional, have the jurisdiction to restrain their action by injunction, as in such cases mandamus and injunction are correlative remedies: *Board of Liquidation v. McComb*, 2 Otto 531.

So that in any event it is a question for the courts. It therefore

becomes a question whether it is to be decided now or after the bonds are issued. If the court has jurisdiction and the proper parties before it, there is every reason why the injury should be prevented rather than attempt to remedy the wrong afterward: *Mott v. Penna. Railroad Co.*, 30 Penn. St. 9; *Davis v. Gray*, 16 Wallace 203; *McComb v. Board of Liquidation*, 2 Otto 531.

It is said the state is an indispensable party. If the state can be made a party in such cases it should be done; that it cannot, is a sufficient reason for not doing so: *Davis v. Gray*, 16 Wallace 220. The attorney-general for the state or any counsellor employed by the governor would have been heard if they so desired.

The funding board are the only persons who could have been made defendants. The creditors have as yet taken no benefit under the act, and are besides unknown, and are too numerous to be made defendants: *Davis v. Gray*, *supra*.

The complainants only have the interest of citizens and taxpayers in common with all other citizens and taxpayers of the state. This would clearly not give them the right to prevent the execution of any unconstitutional law that might incidentally affect them. But such an interest has been held sufficient to entitle them to prevent the establishment of new counties: *Bradley v. Com.*, 2 Humph. 428; the issuance of illegal bonds by a county: *Winston v. T. & P. Railroad Co.*, 1 Baxter 60; also to prevent the execution of an unconstitutional law by which the states right of taxation was to be relinquished: *Mott v. Penna. Railroad Co.*, *supra*; also, to prevent the issue of unauthorized bonds: *Galloway v. Jenkins*, 63 N. C. 147.

To suspend the execution of this law will not interfere with or embarrass the general administration of the public affairs of the state, either with respect to its internal government or in the consummation of any public enterprise upon which the prosperity of the state may be supposed to depend.

The creditors already hold the bonds of the state. To suspend the execution of the act will only prevent the exchange of their bonds for others, which, in my opinion, would contain stipulations by which the state cannot be bound; and, if in this I am correct, it is to the interest of the creditors to have it so now declared.

I am of opinion that the decree of the chancellor dismissing the bill is erroneous.

The first of the head-notes prefixed to the foregoing report of this case is sustained by the opinions of Justices McFARLAND, TURNER and FREEMAN, but dissented from by Chief Justice DEADERICK and Special Justice EWING. The second is sustained by the opinions of Justice McFARLAND, Chief Justice DEADERICK and Special Justice EWING, but dissented from by Justice FREEMAN, no opinion being expressed by Justice TURNER. The third is sustained by the opinions of the chief justice, and all the

justices, but dissented from by the special justice.

It is a subject of regret that all the opinions cannot appear in this place, but their length renders it impossible. Mr. Justice TURNER places his judgment wholly upon the coupon feature of the act premitting any expression of opinion on the subject of bribery of the legislature, while Mr. Justice FREEMAN, in an able exposition of the principles that are involved in the consideration of that question, reaches the conclusion

that, when an act of the legislature, public or private, is in the nature of a contract, and particularly where that contract becomes irrevocable under the federal constitution, and is procured by the bribery of the members of the legislature, it is no invasion by the court of the province of the legislature to enjoin its execution, so that the people shall not become burdened by a law imposed by that character of fraud. He carefully limits the application of the remedy to *contract* enactments, and agrees that as to all other legislation the remedy by repeal is effectual. Mr. Justice McFARLAND seems to find relief in that case, not in the power to enjoin the execution of the act, but of the people to repeal it, if it be repealable, but if not, to repudiate the fraudulent contract; and the three assenting justices may be assumed to have left the remedy there or to have declared there is none. Where the party bound by the contract is a sovereign state, this may be an effectual remedy, but where it is a municipality, as a county or town, this might be no remedy at all, unless the sovereign state withdraws the powers of taxation, as in *Merriether v. Garrett*, 102 U. S. 472. In any case, an innocent party in possession of the bond or other evidence of debt, suffers where the remedial injunction is not applied under the rule of Mr. Justice FREEMAN. On this point relating to bribery of the legislature, that learned justice says:

"If the Constitution forbids this inquiry, if it can never be made by the courts in any case—and if it does not so forbid, it ought to be made in the case of contracts proposed to be made, if anywhere—there is no other remedy. If executed in the form of the bonds in this case, it is idle to say the legislature can repeal the law. The contract will be held unaffected and enforced in spite of that. To say the state shall repudiate the debt is not remedy, but only the act of force or will

that cannot be coerced. That the member can be expelled from the legislature is no remedy, it is only punishment inflicted by the state. To say that his constituency can refuse to elect him is equally futile. They could do that in any case. But that would not affect the liability of the bonds in any way, that would remain precisely the same in both cases, and so the end sought would be totally ineffectual and no remedy at all."

Again, "I would hold that, in all cases of private contracts obtained by individuals for their own benefit or advantage, where it could be clearly shown the assent of the members, or sufficient of them, to pass the bill was procured by bribery, the contract as between the state or her taxpayers and the parties so bribing, is one that may be avoided, and on a proper case the courts should fearlessly apply the remedy. No restraints of delicacy should make them hesitate. I confine my opinion strictly to the case before me, and to like cases, and to acts of the legislature making or proposing to make contracts, expressly repudiating the application of the principle to legislation in the general sense, or in any case except the one indicated. Such an application of the principle is, I think, perfectly safe, can do no injury, and is not, as I think, any infringement upon any affirmative or implied inhibition of the Constitution."

The three opinions which discuss this question are instructive and exhaustive, but our readers must forego the benefit of a full publication for want of space.

Mr. Justice TURNER pretermits the question just mentioned as unnecessary to the determination of the case, as a majority are agreed that the act is void because of the tax-coupon feature of it. On this point he agrees with McFARLAND and FREEMAN, JJ., and discusses the question very much as they do, but gives an additional ground

for his judgment not noticed by them. It violates that provision of the state constitution which appropriates the taxes derived from polls to *educational* purposes, the exception of the statute in favor of the *common school fund* not being commensurate with the constitutional provision: Const. 1870, art. 11, sect. 12.

Mr. Special Justice EWING, sitting in place of Mr. Justice COOPER, who was incompetent by reason of interest, thinks the bill should have been dismissed for want of jurisdiction, because it was substantially a suit against the state or its officers, and forbidden by the Act of 1873, and because the court could only grant relief, if at all, at the suit of the state, but not of the taxpayers. He thinks the tax receivable coupon feature objectionable, perhaps, as a matter of policy, but clearly within the power of the legislature; and that because it is a *contract*, and from that circumstance the federal courts might acquire the ultimate jurisdiction to pass upon its validity or the right to repeal it, is no sound objection to it. It must be presumed those courts will decide properly. He says: "The law may be unwise, but it is not for that reason unconstitutional. If it be unconstitutional upon future contingencies, there is no possibility of its becoming oppressive, as relief could always be had by legislation, which must be sustained by the courts. It is upon the possibility of its becoming oppressive that the argument is made against its constitutionality. But it is neither unconstitutional *in presenti* nor *in futuro*, because of these possibilities. Its oppression under changed circumstances may be relieved against. The fear that this which is called an unconstitutional act may be enforced by the federal courts as a constitutional law, is not, I repeat, a legitimate argument in favor of an injunction, because it supposes that the federal courts will not do right. What

then, if our legislature had no federal restriction, and the omnipotence of parliament, would the law be repealable and therefore valid? Does this legal restriction then determine the character of the law? The federal restriction reducing our sovereignty may disable us from repealing acts, right or wrong, and therefore may make it unwise for us to pass laws of contract which we may not repeal, but does it affect the power? The legal restriction should be looked to in the exercise of the power as in any event it attaches."

This strikes the most vulnerable place, perhaps, in the position of the majority if it fairly states that position. But it also suggests a potential reason for constitutional inhibition on the legislature from passing "laws of contract which we may not repeal," as that is by far the safest guaranty against unwise laws of contract. The Tennessee Constitution of 1870, did much in that direction by substituting section 8, of art. 11, for section 7 of the same article, in the Constitution of 1834, but it certainly falls short of the entire restriction which would be contained in a reservation of power to alter, amend or repeal all laws, by which every state constitution could possibly limit the prohibition of the federal constitution, in its practical operation, to those laws which might impair private contracts. But the principle of the majority ruling in this case operates to protect the state against any contract that bargains away or imposes restrictions upon the absolute powers of taxation and appropriation of the public revenue, by declaring the contract itself void, whether the act be repealable or irrepeatable. What is said about the federal restriction is rather in favor of the remedy by injunction, than applicable to the character of legislation as being valid or invalid. The court secures to itself, by sustaining that remedy, the right of ultimate decision in construing the state constitution, and ren-

ders unnecessary any appeal to the federal Supreme Court to construe the federal Constitution. This is, probably, an unnecessary precaution, as the latter court would quite surely follow this very decision, whatever its own judgment might be, if it should have occasion hereafter to hear the question, as it followed the Virginia court the other way. It does not follow the vacillations of the state courts in the construction of state constitutions, but otherwise is quite obedient to them.

On the general subject Mr. Justice EWING, says: "If it is unconstitutional at all it is not upon speculative possibilities. If it were absolutely certain that the state would always retain its present ability to meet interest and provide for ordinary governmental expenses, there would be no ground for the charge that it is infringed upon. Absolute sovereignty in a republic may consist with moral obligation which is neither coercive nor derogatory to sovereignty. * * * When the ability is lost it may well be that the moral obligation ceases or is suspended. The new circumstances may justify a repeal, and this repeal we must suppose would be sustained by the federal courts, as not impairing the obligation of contracts. In this view the coupon feature becomes merely a convenient mode of providing for payment of the public debt." The learned judge discusses all the questions elaborately and with distinguishing ability, but want of space forbids further extracts.

To the above argument the majority opinions reply that the objectionable coercion is not found in the moral obligation, but the power to compel payment regardless of that consideration and against the will of the people as it may exist at the moment at which any particular payment is demanded within the ninety-nine years the bonds mature. And, they do not think it safe to rely on any court to hold that the fact of impairment of the obligation protected by the federal con-

stitution depends, in any way, upon a change of circumstances simply in respect to ability to pay. See *Sturges v. Crowninshield*, 4 Wheat. 122. That might devolve on the courts the legislative function of determining when the ability to pay is gone, and permit them to do that which is prohibited to the legislature, namely, to impair or abrogate the obligation according to changing circumstances disconnected with the contract itself, their judgment being only a review of the action of the legislature on the question of fact whether the debtor was able to pay.

Mr. Justice WASHINGTON, in defining the obligation alluded to by the Constitution says, in *Ogden v. Saunders*, 12 Wheat. 258, "It cannot, for a moment, be conceded that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect kind, which the parties to it are free to obey or not, as they please. It cannot be supposed it was with this law the grave authors of this instrument were dealing."

The question of the suability of the officers appointed to fund the debt, and that of the right of a taxpayer to file the bill, are instructively discussed, but being of somewhat local interest the points are not further noticed here. The conclusions of the venerable chief justice, being very brief, are subjoined as follows:

"The main question arising in this case has been so elaborately and exhaustively discussed in the four opinions already read, that I deem it unnecessary to repeat reasons already given or cite authorities already referred to, to sustain the conclusions at which I have arrived upon the several questions involved.

"I content myself, therefore, with the simple announcement of the conclusions at which I have arrived upon the several propositions contained in the bill and discussed at the bar.

"1. I am of opinion that the title of the act, 'to compromise and settle the bonded indebtedness of the state of Tennessee,' sufficiently expresses the subject thereof; that it contains but one subject, the several sections of the act being pertinent to the object expressed in the title, and, therefore, it is not void, as being repugnant to sect./17, of art. 2, of the Constitution of Tennessee.

"2. I am further of opinion that the courts of the state have no power to review or reverse the legislative action of the General Assembly, except for the reason that such action is a violation of the Constitution; and that such action, if within their constitutional power, cannot be questioned by the courts of the state upon allegations of fraud and bribery.

"3. I am also of opinion that taxpayers citizens may file their bill to protect themselves from the injurious operation of a threatened and impending act, which is alleged to be unconstitutional, although such act is about to be performed under the apparent authority of the state. The court may inquire if

there exists legal authority for the act, if so, it will not impede or obstruct it. On the other hand, if it appears it is prohibited by the fundamental law, it should restrain it upon the ground that the injurious act about to be done is unauthorized by law.

"4. I am, therefore, of the opinion that the constitutionality of the act is fairly presented to this court for its decision, and that the question for our deliberation is, had the legislature the power to pass it? And in my opinion it had the power—there being no inhibition or restraint in the Constitution to prevent it from doing so.

"I therefore concur with Judge EWING in holding that the act is constitutional and valid, and that the chancellor's decree dismissing the bill should be affirmed."

It is proper to explain that no one opinion can be called the opinion of the court, but that of Mr. Justice McFARLAND discusses *all* the points on which a majority of the judges agreed, and is, therefore, selected for publication in full.

H.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ARKANSAS.²

SUPREME COURT OF GEORGIA.³

COURT OF ERRORS AND APPEALS OF MARYLAND.⁴

SUPREME JUDICIAL COURT OF MASSACHUSETTS.⁵

SUPREME COURT OF MISSOURI.⁶

ACKNOWLEDGMENT.

Married Woman—Evidence.—A married woman's acknowledgment

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

² From B. D. Turner, Esq., Reporter; to appear in 37 Arkansas Reports.

³ From J. H. Lumpkin, Esq., Reporter; to appear in 66 Georgia Reports.

⁴ From J. Shaaff Stockett, Esq., Reporter; to appear in 56 Maryland Reports.

⁵ From John Lathrop, Esq., Reporter; to appear in 131 Massachusetts Reports.

⁶ From T. K. Skinker, Esq., Reporter; to appear in 74 Missouri Reports.

to a deed properly certified, is *prima facie*, but not conclusive evidence against her, either that the acknowledgment was made as certified, or that the facts acknowledged were true, except as to a vendee for valuable consideration, ignorant of the falsity of the facts, and not participant in the fraud. As to him, she is estopped to deny an acknowledgment actually made: *Holt v. Moore*, 37 Ark.

Omission of "Purposes."—An acknowledgment of a mortgage which does not show that the mortgage was executed for the "*purposes*" therein expressed, is insufficient to admit it to record; and the mortgage is no lien upon the property, as against a subsequent purchaser, even with notice: *Ford v. Burks*, 37 Ark.

ATTACHMENT. See *Garnishment*.

ATTORNEY.

Power to Compromise Suit.—An attorney as such, has no power to compromise claims placed in his hands for collection, or in respect to which he may be employed to recover judgment. He can take nothing in satisfaction of the claim or judgment except money, nor can he receive a less sum than is really due thereon, without the express authority of his client obtained for the purpose. And if he assume to act without such express authority, his acts in making the compromise, or agreeing to take a less sum in satisfaction than is really due, will not bind the client unless the latter, with full knowledge of all the facts, has ratified what has been done by the attorney; though such ratification may be inferred from acquiescence, and from the facts and circumstances of the case: *Fritchey v. Bosley*, 56 Md.

BANK. See *Taxation*.

BANKRUPTCY.

Discharge—Subscription to Stock of Corporation—Debt of Fiduciary Character.—There is nothing of a fiduciary relation or character created by a subscription of the debtor to the stock of a corporation, more than exists in the ordinary relation of debtor and creditor; and an action to recover such subscription is barred by the discharge: *Morrison v. Savage*, 56 Md.

BILLS AND NOTES. See *Executors and Administrators*.

When a Sealed Instrument—Statute of Limitations.—To render a promissory note a sealed instrument it should be so recited in the body of the note. The mere addition of a seal after the signature is not sufficient: *Chambers v. Kingsbury*, 66 Geo.

A note in the usual form, but with a seal added after the signature, will be barred after six years from maturity: *Id.*

COMMON CARRIER.

Negligence—Limitation of Liability—Live Stock.—Though a shipper of live stock contracted with the transporting railroad that it was not to be responsible for attention, feeding or watering of the stock, but that it should afford the shipper reasonable facilities for those purposes, yet if the railroad carried the stock beyond the destination fixed by the bill

of lading, and there detained them for several days before their return, it would not be relieved from liability for failure to care for the stock after passing the proper destination: *Bryant v. Southwestern Railroad Co.*, 66 Geo.

CONTRACT. See *Telegraph*.

COPYRIGHT.

Infringement—Proof of Deposit of Books with Librarian of Congress, Essential—Certificate of Librarian.—The deposit with the librarian of Congress of two copies of a copyrighted publication is an essential condition of the proprietor's right, and must be proved in an action for infringement: *Merrill v. Tice*, S. C. U. S., Oct. Term 1881.

A memorandum of such deposit upon a copy of the record of the title page, certified by the librarian of Congress, is not competent evidence thereof: *Id.*

Whether the certificate of the librarian, under his official seal, that the books had been deposited would be competent evidence of such deposit, *quære: Id.*

CORPORATION.

Transfer of Stock—When complete.—In the absence of a legislative enactment restricting the transfer of stock to any particular mode, the transfer is complete on delivery of the certificate with power to transfer, and payment of the purchase-money, not only between vendor and vendee, but when the corporation has unjustifiably refused to make the transfer on its books, against a creditor of the vendor, who, without notice of the transfer, attaches the stock: *Merchants' Nat. Bank v. Richards*, 74 Mo.

CRIMINAL LAW.

Breaking Partition Fence—Trespass.—It is not a misdemeanor for one to break a partition fence between his lot and another's, and which is the common property of both. Nor is it a trespass for him to knock off the plank added to it by the other; but destruction of such fence would be a trespass: *Drees v. The State*, 37 Ark.

DEED. See *Name*.

Gift in restraint of Marriage—Construction of Deed—Validity.—W. H. C., in consideration of one dime and of natural love and affection, conveyed by deed certain leasehold property to his two sisters M. and E., "to have and to hold the same unto the said M. and E. as tenants in common so long as they both shall live, and from and after the death of either of them, then unto the survivor so long as she shall live and no longer, or so long as they both shall remain unmarried; and from and after the marriage of either of them, then unto the one remaining unmarried, so long as she shall live and no longer." M. married, and E., who remained unmarried, took exclusive possession of the premises. Upon an ejectment brought by M. and her husband to recover an undivided moiety of the premises, it was held that the purpose of the brother evidently was, not to restrain the marriage or promote the celibacy of his sisters, but to give them a small property as a home or support until they should severally marry and have husbands

to maintain them; and that there was nothing immoral or illegal in this purpose, and it was carried out by this deed without infringing any rule of law: *Arthur v. Cole*, 56 Md.

ERRORS AND APPEALS.

Limitation under sect. 1008 Rev. Stat.—Applies to State Courts.—The limitation of two years prescribed by sect. 1008 Revised Statutes for bringing writs of error to the Circuit and District Courts applies to writs of error to state courts: *Cummings v. Jones*, S. C. U. S., Oct. Term 1881

Construction of State Statute—Decision by Circuit Court—Subsequent contrary Decision of State Court—Erroneous sustaining of Demurrer to one Replication.—The construction given by the Supreme Court of a state to a statute of limitations of the state will be followed by the United States Supreme Court in a case decided the other way in the Circuit Court before the decision of the state court: *Moores v. Citizens' Nat. Bank*, S. C. U. S., Oct. Term 1881.

The erroneous sustaining of a demurrer to a replication to one of several defences in the answer, requires the reversal of a final judgment for the defendant which is not clearly shown by the record to have proceeded upon other grounds: *Id.*

Practice — Verdict.—A judgment will not be reversed at the instance of the party against whom it was rendered on the ground that the verdict was for but half the amount shown by the evidence to be due if any recovery at all was to be had: *Alderman v. Cox*, 74 Mo.

EXECUTION.

Levy on Real Estate—Not satisfaction.—A levy on real estate undisposed of is not *prima facie* evidence of satisfaction of the *fi. fa.*, as is the case with a levy on personalty: *Overby v. Hart*, 66 Ga.

That a *fi. fa.* has been levied on land, a claim interposed and dismissed, and the *fi. fa.* ordered to proceed, will not prevent a levy on other realty or require the *fi. fa.* to proceed on the original levy first: *Id.*

EXECUTORS AND ADMINISTRATORS. See Notice.

Promissory Note—Signing as Administrator.—An administrator who signs a note describing himself as administrator becomes personally liable, unless he expressly stipulates to pay out of the estate only: *Studebaker Bros. Man. Co. v. Montgomery*, 74 Mo.

GARNISHMENT.

Interrogatories—What allowable.—In a trustee process, the plaintiff may put interrogatories to the trustee calculated to elicit facts which will tend to charge him, but not to contradict or impeach him: *Nutter v. Framingham & Lowell Railroad Co.*, 131 Mass.

Mortgage—Right of Attaching-creditor to redeem.—An attaching-creditor cannot maintain an action to redeem land covered by his attachment from a mortgage executed by the debtor: *Fisher v. Tallman*, 74 Mo.

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GUARDIAN AND WARD.

Settlement with Ward—What information necessary—Acquiescence.—Receipts in full and final settlement, given to a guardian by his ward after becoming of age and acquiesced in for more than four years, are *prima facie* binding upon her: *Steadham v. Sims*, 66 Geo.

If a guardian settle with his ward out of court, it is his duty to inform her concerning the condition of her estate, that she may act with full knowledge, but it is not incumbent on him in all cases to make a precise and detailed statement of receipts and expenditures, debts with interest on them, &c.: *Id.*

HUSBAND AND WIFE.

Divorce—Alimony—Decree for Specific Personal Property.—A decree vesting in the wife specific personal property of the husband, as alimony in gross, is valid, at least when made in pursuance of an agreement of the parties: *Crews v. Mooney*, 74 Mo.

Such a decree, even if it were beyond the power of the court to make it, could not be avoided in a collateral action: *Id.*

Divorce—Decree against Non-resident—Effect of.—Judgments *in personam* are not binding upon persons living beyond the limits of the state, unless they voluntarily appear and answer the suit: *Garner v. Garner*, 56 Md.

Where the defendant in a divorce suit is a non-resident, the jurisdiction of the court is limited to the dissolution of the marriage: *Id.*

Where the decree goes farther and says the defendant shall not marry again, such prohibition is not necessarily a part of the decree dissolving the marriage, but is in the nature of a decree *in personam*, affecting the rights of a party beyond the jurisdiction of the court, and so much of the decree is invalid: *Id.*

Purchase by Husband with Wife's Money—Bona fide Purchasers from Husband.—If a husband uses the money of his wife, with or without her consent, and thereby acquires title in himself to property, third persons who *bona fide* take title for value to such property will be protected: *Gorman v. Wood*, 66 Geo.

Mortgage by Wife to secure Husband's Debt—Parol Evidence to identify Debt.—A mortgage was given by a husband and wife on her land to A., as security for sales of goods to be made by him to the husband. *Held*, that parol evidence was admissible to show that the liabilities which the mortgage was intended to secure were those to be incurred by the husband to a firm of which A. was a member; and that it was immaterial that the wife did not know of the existence of the firm when she executed the mortgage, or when the subsequent purchases of goods were made: *Hall v. Tay*, 131 Mass.

INSURANCE.

Wagering Contract—Assignment of Policy to one not having Insurable Interest.—The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipu-

lates for the proceeds of the policy beyond the sums advanced by him he stands in the position of one holding a wager policy : *Warnock v. Davis*, S. C. U. S., Oct. Term 1881.

For all sums collected by such assignee upon the policy in excess of the moneys advanced by him the courts will compel him to account to the representatives of the deceased : *Id.*

Policy for use of Third Person—Right to recover back Premiums.—If a policy insures the life of A. for the use of B., A. cannot maintain an action against the insurer for the premiums paid by him on the policy, although the policy never took effect by reason of fraud on the part of the agents of the insurer : *Trabandt v. Conn. Mut. Life Ins. Co.*, 131 Mass.

JUDGMENT.

Power of Court to Set Aside—United States Courts not controlled by State Statutes or Practice of State Courts—Laches in applying for Relief.—It is a general rule that all judgments, decrees or orders are under the control of the court which pronounces them, during the term at which they are rendered, but that after the term is ended they are beyond such control : *Bronson v. Schulten*, S. C. U. S., Oct. Term 1881.

To this rule there has always existed an exception founded on the common-law writ of error *coram vobis* which brought before the same court where the error was committed certain mistakes of fact not put in issue or passed upon by the court, such as the death of one of the parties when the judgment was rendered, coverture of a female party, infancy and failure to appoint a guardian, error in the process or mistake of the clerk. But if the error was in the judgment itself the writ did not lie. What was formerly done by this writ is now attained by motion and affidavits : *Id.*

Some of the state courts have a larger power conferred by statute, and others have extended their power by asserting a control over their judgments and administering equitable relief in a summary way. Neither the state statutes nor the practice of the state courts can control the United States Courts : *Id.*

Negligence and laches of the party in discovering the mistake will bar his right to relief : *Id.*

LANDLORD AND TENANT.

Re-letting to Tenant after Judgment for Possession—Effect of—A re-letting of the premises to a tenant after recovering a judgment for possession against him, is a satisfaction of the judgment, and an execution on the judgment after the new lease will be enjoined : *Barney v. Cain*, 37 Ark.

Sub-lease for whole of Unexpired Term—Liability of Sub-lessee.—The lessee of an estate for a term of years, at a fixed rent payable quarterly, and who had covenanted to pay taxes, demised it to another for a term equal to the whole of the unexpired term of the original lease, by a lease containing covenants by the lessee to pay rent monthly at an increased rate, and taxes, and providing that the lessor might enter and take possession for breach of covenant, and that the lessee would quit and deliver up the premises to the lessor at the end of the

term. *Held*, that this was a sub-lease and not an assignment of the original lease; and that the sub-lessee was not liable to the original lessor upon the covenant to pay the taxes in the original lease: *Dunlap v. Bullard*, 131 Mass.

LEGACY.

When not a Charge on Land.—Legacies and annuities, whether payable by an executor or a devisee, are not to be considered charges upon real estate, unless the intention of the testator to charge it is either expressly declared or may be fairly inferred from the will: *Owens v. Claytor*, 56 Md.

A testatrix, being seised of an undivided two-thirds interest in a tract of land, containing one hundred and twenty-five acres, devised to her son John forty acres thereof, and to her son Frank the remaining forty-three acres. In a subsequent clause in the will she gave to her niece Mary her bedroom furniture, and also an annuity, in the following terms: "It is likewise my will that each of my sons, Frank and John, shall pay to my said niece Mary the sum of \$30 per annum, in equal instalments every two months:" *held*, that the annuity thus given must be considered as a mere charge on the devisees in respect of the land devised to them, and not a charge on the land itself: *Id.*

MALICIOUS PROSECUTION.

Malice—Proof of—When presumed.—To maintain an action for maliciously attaching the plaintiff's goods, it is not necessary to prove that the defendant, in suing out the attachment, acted dishonestly or with actual malice. If there was no probable cause to believe that the facts alleged in the affidavit for the attachment were true, the jury may presume malice: *Bozeman v. Shaw*, 37 Ark.

MASTER AND SERVANT.

Dangerous Machinery—Youth and inexperience of Servant—Vice-principal.—Where a servant, engaged in operating machinery, is by reason of his youth and inexperience, not aware of the danger to which he is exposed, it is the duty of his master to warn him, if he himself knows of it, and this notwithstanding the existence of that which renders the machinery dangerous is known to the servant: *Dowling v. Allen*, 74 Mo.

A foreman in charge of a distinct piece of work in an extensive foundry, and having under him laborers bound to obey his orders, is, as to them, a vice-principal to their employer, and not their fellow-servant, and this although another may be general foreman of the entire establishment, with authority over him: *Id.*

MECHANIC'S LIEN.

Contractor not Agent for Owner—Measure of value of Materials—Declarations of Contractor.—The Mechanic's Lien Law does not establish the relation of principal and agent between the owner and contractor. Prices agreed upon between the latter and a material-man are, therefore, not binding upon the owner. As against him only the market value of the materials can be recovered. The agreed prices will,

however, be received as *prima facie* evidence of the market value : *Deirdorff v. Everhartt*, 74 Mo.

For the same reason, declarations of the contractor (*e. g.* that materials purchased by him were used in a particular building) are not evidence against the owner. Overruling *Morrison v. Hancock*, 40 Mo. 564 : *Id.*

A lien cannot be enforced against a building for materials furnished to the contractor but not put into the building : *Id.*

MINING. See *United States*.

MORTGAGE. See *Acknowledgment*.

Of undivided Interest—Subsequent Partition.—A mortgage of an undivided moiety in land will not be transferred and limited to the whole of a particular part of it allotted to the mortgagor in severalty by a subsequent partition between the co-tenants to which the mortgage was not a party nor assented : *Jackman v. Beck*, 37 Ark.

MUNICIPAL CORPORATION. See *Taxation*.

NAME.

Term "Junior"—Father and Son of Same Name—Presumption as to Conveyance—Evidence.—The term "Junior" is no part of a man's name : *Simpson v. Dix*, 131 Mass.

If a son, who bears the same name as his father, buys land in his own name, without the designation of "Junior" added thereto, there is no presumption of law that he intended that his father should take the title to the land : *Id.*

If land is conveyed to J. S., and there are two persons of that name, a father and son, there is no presumption that the father is intended ; and evidence is admissible to show who is the grantee : *Id.*

NEGLIGENCE. See *Common Carrier ; Master and Servant*.

Ice on Sidewalks—Contributory Negligence—Evidence.—The fact that a person noticed, on entering a building, that there was ice and snow on a plank sidewalk in front of the door, is not conclusive evidence, in an action by him against the owner of the building for an injury sustained on his way out of the building in consequence of such snow and ice, that he was not in the exercise of due care in attempting to pass over the sidewalk : *Dewire v. Bailey*, 131 Mass.

NEGOTIABLE INSTRUMENTS.

Stolen Coupons—Purchase after Maturity—Presumption as to Previous Negotiation.—In an action of replevin for interest coupons, payable to bearer, the case was submitted on agreed facts, which stated that the bonds, to which the coupons were then attached, were before maturity stolen from the plaintiff ; that after maturity they were bought by a person named, in good faith, and passed through the hands of several persons named until they came into the possession of the defendant, and that all these persons were purchasers in good faith and for value. *Held*, that there was no presumption that the thief had negotiated the coupons before maturity ; and that the plaintiff was entitled to judgment : *Hinckley v. Merchants' Nat. Bank*, 131 Mass.

NOTICE.

Purchase by Executor—Passing Title through Third Person.—Two executors sold realty of their testator; a third party bought; on the same day he conveyed the land to one of the executors individually; some two years thereafter the latter sold to a purchaser for value; the deeds on their faces all purported to be for a fair and valuable consideration. *Held*, that in the absence of all actual notice, the facts appearing from the recorded deeds, were not sufficient to put the purchaser on notice that the sale was by an executor to himself: *Cox v. Barber*, 66 Geo.

PARENT AND CHILD.

Custody of Child—Who entitled to.—In deciding contests upon writs of *habeas corpus* for the custody of infant children, the principles adopted in the chancery court must govern. No rigid rules to govern the practice have or can be formulated. Subject to a few general rules to be taken as a guide, the chancellor must exercise his judgment upon the peculiar circumstances of the case, and act as humanity, respect for the parental affection and regard for the infant's best interests may prompt. All three should be considered. Neither should be conclusive: *Verser v. Ford*, 37 Ark.

As against strangers, the father, however poor and humble, if of good moral character and able to support the child in his own style of life, cannot be deprived of the privilege by any one whatever, however brilliant the advantage he may offer. It is not enough to consider the interest of the child alone. And as between father and mother, or other near relation of the child, where sympathies of the tenderest nature may be confidently relied on, the father is generally to be preferred: *Id.*

PARTITION. See *Mortgage*.

PARTNERSHIP.

Appropriation of Partnership Funds—Question for the Jury.—An appropriation of partnership funds or effects by one partner without the previous knowledge and consent of his copartners, to the payment of a debt which the creditor knew at the time was the private debt of the particular partner, is presumptively fraudulent: *Johnson v. Crichton*, 56 Md.

The presumption of fraud or *mala fides*, however, in respect to such transaction, may be rebutted by proof of authority given by the other partners, or of their knowledge and consent, or of their ratification: *Id.*

Whether such authority or consent was given by the copartner, is a question for the jury: *Id.*

SALE.

Stock of Goods—Opportunity of Inspection—Representations.—A buyer of an interest in a stock of goods and in a business, who has ample opportunity afforded him to examine the goods and the books of the business, has no right to rely upon representations of the seller concerning the value of the goods or of the amount of business which the seller has previously done: *Poland v. Brownell*, 131 Mass.

TAXATION.

Improvement for benefit of Particular District—Presumption as to determination of Councils—Relief from Local Assessment.—Where there is nothing upon the face of an ordinance, authorizing a particular improvement, to indicate that those who passed it judged that the improvement was for the public convenience exclusively, and not for the benefit of the particular district, the presumption is that they determined that those who were specially assessed would be specially benefited: *Mayor and Councils of Baltimore v. The Johns Hopkins Hospital*, 56 Md.

Whether an improvement authorized by the mayor and city council of Baltimore will benefit the property along the line of such improvement, is a question left exclusively to their judgment, and their determination in the premises is final and conclusive. The courts have no power to review such determination at the instance of the property owners specially taxed: *Id.*

If a local assessment imposed for an improvement, directed to be made, should so far transcend the limits of equality and reason that its execution would cease to be a tax, or contribution to a common burden, and become extortion and confiscation, it would be the duty of the court in such case to interfere to protect the citizen: *Id.*

Personal Liability of Owner—Assessment in Another Name.—The owner of real estate is not personally liable for taxes assessed against another as owner: *City of Jefferson v. Mock*, 74 Mo.

Corporation—Exemption in Charter—To what Property applicable. A provision in the charter of a corporation that it shall pay a certain tax on its capital stock in lieu of all other taxes, exempts from taxation only the property of the corporation necessary for its business: *Bank of Commerce v. State of Tennessee*, S. C. U. S., Oct. Term 1881.

The charter of a bank provided for the payment of a tax on its capital stock "in lieu of all other taxes." It also authorized the bank to purchase ground for use as a place of business, and to hold property conveyed to it to secure debts. The bank bought a lot and erected a building, using the first floor for its business, and renting the other floors. It also purchased three other lots at a sale under a trust-deed made to it to secure a loan. *Held*, that the bank was liable for taxes on the part of the building not used for its business, and also on the other three lots of ground: *Id.*

TELEGRAPH.

Liability of Company for Negligence—Conditions—Repeating—Measure of Damages—Trade terms in Message—Illegal Transaction.—When a telegraph company, for a compensation, receives a message for transmission, it is bound to perform its contract with integrity, skill and diligence; and if, by reason of the want of any of these qualities, the message be improperly transmitted, and injury accrues, the company will be liable: *West. Union Tel. Co. v. Blanchard*, 66 Geo.

If it is necessary for the company, in transmitting messages with integrity, skill and diligence, to have them repeated, the duty of so doing devolves upon it, not upon the sender: *Id.*

The company cannot, by any rule or regulation of its own, protect itself against damages resulting from every degree of negligence except

gross negligence or fraud. Nor can it limit the damages to be recovered to a return of the amount of toll paid: *Id.*

A message in these terms, "Cover two hundred September and one hundred August," was shown to be the ordinary expressions used in the cotton trade, meaning that the person receiving the message should sell for the sender two hundred bales of cotton deliverable in August and one hundred deliverable in September: *Held*, that it was not such an obscure message as would limit the usual liability of the company: *Id.*

An agent can recover from his principal expense and loss incurred in carrying out a contract, even though such contract be illegal; and if such loss is caused by the negligent transmission of a telegram, the principal, upon reimbursing the agent, may recover from the telegraph company: *Id.*

The illegality of the contract would not relieve the company from liability for its negligence: *Id.*

TRESPASS. See *Criminal Law*.

UNITED STATES COURTS. See *Judgment*.

UNITED STATES.

Patent for Land—Conclusiveness of—Mining Claim—Validity of.—A patent in a court of law is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority—that is, when it has jurisdiction under the law to convey the land. In such court the patent is unassailable for mere errors of judgment: *St. Louis S. & R. Co. v. Kemp*, S. C. U. S., Oct. Term 1881.

On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated by showing that the department had no jurisdiction—that is, that the law did not provide for selling them, or that they had been reserved or dedicated to special purposes, or had been previously transferred to others: *Id.*

There is nothing in the Acts of Congress which limits the size of a mining claim for which a patent may issue. The limitations in sects. 2330, 2331 Rev. Stat. relate to locations, and not to patents: *Id.*

The owner of contiguous locations may consolidate them into one and present but a single application for a patent therefor, and such patent may be granted by the Land Department: *Id.*

WILL.

Executory Devise—Surviving Children—Grandchildren.—A will bequeathed property to the executors of the testator, in trust for the sole and separate use of the testator's daughter for life, "and from and after her death in trust for such child or children as she may leave, his, her or their assigns for ever, but if my said daughter shall die leaving no children or child, then to my right heirs living at the time of their death." *Hell*, that such bequest created an executory devise which vested on the death of the life usee in such of her children as survived her. A child who died before the life usee, took nothing: *White v. Rowland*, 66 Geo.

Grandchildren cannot take under a bequest to children unless there be something in the will to indicate such intention by the testator: *Id.*

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THE ACTION FOR THE MALICIOUS PROSECUTION OF A CIVIL SUIT.

(Continued from p. 290, ante.)

VI. *The American Adjudications.* *The Action not sustained.*—We turn now to the American adjudications on the subject; and here we find a conflict. We shall first review chronologically the cases in which the English doctrine has been followed, passing afterwards to those where the action has been sustained.

The earliest case in which the question was presented to the courts of this country seems to be *Taylor v. Wilson*, Coxe 362, determined in the Supreme Court of New Jersey in the year 1795. The report is very brief, the following being a complete copy: "Taylor against Wilson. On *certiorari*. It appeared from the return in this case, that Taylor, the defendant below, had been summoned to answer Wilson in a plea of damage; Wilson's action appeared to have been in part to recover from Taylor certain costs and expenses which he had incurred in defending himself in a suit brought against him by Taylor before Justice TATEM, in which the justice decided there was no cause of action. *PER CURIAM*.—This judgment must be reversed; no action lies for such expenses, though there can be no doubt Wilson has been injured." The reporter's *syllabus* to the case is in these words: "No action lies to recover the expenses to which a party has been put by being improperly sued."

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The report of *Woodmansie v. Logan*, 1 Penn. (N. J.) 68, decided in New Jersey in 1806, contains this quaint head note : "Action lies not for bringing and failing in a suit." The demand was evidenced by the following bill :

SAMUEL WOODMANSIE,

To ROBERT LOGAN, DR.

For expense going to Monmouth	\$20.00
For my damage on the same account	50.00
	<hr/>
	\$70.00

There was a judgment below in favor of the plaintiff for \$50 and costs, which was reversed on appeal. "There are sundry errors in the form of proceeding in this case," said KIRKPATRICK, C. J., "but I think there is also one which goes to the ground of the action itself. The second reason assigned for reversal is in substance, that Woodmansie, as administrator of Penelope Woodmansie, had brought an action against Logan for a debt said to be due to the estate, before a justice at Freehold ; that Woodmansie, in that action, became nonsuited, and that Logan, for the damages he had sustained by that prosecution, brought this action and obtained judgment. And upon inspecting the case filed, this reason appears to be well founded. The statement is indeed very vague and uncertain, but if anything can be drawn from it, it is the train of facts set forth in this reason, and nothing more. There is contained in it no pretence of Logan's having been held to bail oppressively, or of his having been imprisoned, or any other special grievance. Now it is clearly established in our books, that for commencing a civil action, though without sufficient cause, no action on the case for a malicious prosecution will lie. Every man is entitled to come into a court of justice and claim what he deems to be his right ; if he fails he shall be amerced according to the old principle for his false claim, and the defendant is entitled to his costs, and with those he must be content. It was formerly held, it is true, that if a plaintiff procured the defendant to be held to excessive bail, or to be imprisoned for want of such bail, by any false declarations or representations, an action would lie against him for special damages on account of these false representations or declarations ; but never merely because he prosecuted an action of law in which he failed. And indeed, now the doctrine of bail

is more precisely fixed by statute, and in most cases it is put beyond the power of the plaintiff to oppress in this respect, which too is eminently the case in justices' courts; it is much to be doubted whether actions for malicious prosecutions in civil cases will lie at all. Be that, however, as it may, no such thing is pretended here."

In *Thomas v. Rouse*, 2 Brev. 75, a South Carolina case, decided in 1806, BREVARD, J., said: "To bring a civil action, though there should be no ground for it, is not actionable unless for consequential damages. It is a claim of right, and the plaintiff may sue at the peril of costs. If it appeared the action was vexatious and malicious, or with a view to oppress the party, by holding him to unreasonable bail, the plaintiff would be entitled to recover."

Ray v. Law, 1 Pet. C. C. 207, arose in the federal court in Pennsylvania, in 1816, and Mr. Justice WASHINGTON said: "This is an action for what is called a malicious prosecution. The grounds of the action are a vexatious suit, brought against the plaintiff maliciously and without probable cause, and holding him to excessive bail. The law in relation to actions of this nature is not disputed in this case. Demanding excessive bail, although the plaintiff has a well-founded cause of action, or holding to bail when the plaintiff has no cause of action, if done for the purpose of vexation, entitles the party aggrieved to an action for a malicious prosecution. If bail be not demanded, it is unimportant how futile and unfounded the action may be, as the plaintiff is punished by the payment of costs, and the defendant is not materially injured."

In *Potts v. Imlay*, 1 South. 330, the question came before the Supreme Court of New Jersey in the year 1816. The facts were these: Potts commenced a suit against Imlay in an inferior court, on June 10th 1813, the summons being made returnable June 19th. On that day, at the request of Potts, the cause was adjourned until July 10th, on which day he did not appear, but suffered a nonsuit. On July 17th he commenced another action against Imlay, in the same court and for the same sum as before, the summons being made returnable July 27th. On that day he obtained a continuance till August 7th, when he discontinued the suit. Thereupon Imlay brought an action for malicious prosecution, and obtained a judgment for damages in the sum of \$50. The case was then removed to the Supreme Court by *certiorari*, the principal reason

relied on for reversal being that the action was not maintainable. Of this opinion were a majority of the court. Said KIRKPATRICK, C. J.: "There are several reasons assigned for the reversal of this judgment, but the one principally relied upon, and the only one of which I shall take notice, is the fourth, that is to say, because the state of demand is illegal and insufficient, and contains no lawful cause of action. The cause has been twice argued at the bar upon this reason, the last time at the request of the court, and with much ability. The books have been searched for four hundred years back, and upon that search it is conceded, even by the counsel for the plaintiff below himself, that no case can be found in which this action has been maintained in circumstances similar to the present. It is true that there are general expressions made use of by some of the annotators which might seem, at first view, to embrace the case, as in Hargrave's Notes upon Co. Lit. 161, and some others; so, also, in some of the reporters. But these general expressions, by fair rules of construction, are to be limited and compared with the adjudged cases themselves, and not to be carried beyond them. With such limitation, of which too they will very fairly admit, they are perfectly consistent with general principles, but without it they are not law. Formerly the amercement, now the costs, are the only penalty the law has given against a plaintiff for prosecuting a suit in a court of justice in the regular and ordinary way, even though he fail in such prosecution. The courts of law are open to every citizen, and he may sue, *toties quoties*, upon the penalty of lawful costs only. These are considered as a sufficient compensation for the mere expenses of the defendant in his defence. They are given to him for this purpose, and he cannot rise up in a court of justice and say the legislature have not given him enough. If we were legislators, indeed, perhaps we should be inclined to say that the costs, in all cases where costs are given, should completely indemnify the party for all his necessary expenses, both of time and money; but those to whom this high trust is committed in this state, have thought, and we will presume, have wisely thought, otherwise. In England it is believed that costs are in some measure discretionary with the court, and are apportioned to the circumstances of the case; but here it is not so. They are fixed by statute; they can neither be increased nor diminished, but, *ceteris paribus*, are precisely the same in all cases. Perhaps a greater latitude given to the courts

of justice ought, in some degree, to alleviate the hardships now complained of. Besides, if we go to the very equity of the thing, which seems to be the ground of argument here taken, the same reasoning which is here used to prove that the defendant ought to have damages upon a false claim, would also prove that the plaintiff ought to have damages upon a false plea. He is put to all the expense of a trial upon such plea, and yet he can recover nothing therefor but his lawful costs; though surely all experience teaches us that the plea of the defendant is not less frequently false than the claim of the plaintiff. But to what excesses would this lead us? Where would litigation end? The truth is that merely for the expense of a civil suit, however malicious and however groundless, this action does not lie, nor ever did, so far as I can find, at any period of our judicial history. It must be attended, besides ordinary expenses, with other special grievance or damage, not necessarily incident to a defence, but superadded to it by the malice and contrivance of the plaintiff; and of these an arrest seems to be the only one spoken of in our books. * * * Upon the whole, upon the strength of these authorities, I think it may be laid down as law that this action cannot be maintained for prosecuting a civil suit in a court of common law having competent jurisdiction, by the party himself in interest, unless the defendant has, upon such prosecution, been arrested without cause and deprived of his liberty or made to suffer other special grievances different from and superadded to the ordinary expense of a defence. The case before us is for a suit commenced by summons where there could be no arrest, nor does the state of demand set forth any grievance or damage, other than or different from the common expenses of making defence in suits of this kind. That the litigation was protracted as far as the rules of the court would admit, that it was renewed and ultimately discontinued by the party does not alter the case. These circumstances are, at most, only evidence that the prosecution was malicious and without probable cause; but this is not enough. There must be a special grievance, and that specifically charged in the complaint filed." ROSSELL, J., dissented, saying: "The reason why but few cases of malicious prosecution are found in the English reports is, that the costs are sufficiently great to deter men from bringing suits there merely for vexation. So, in our courts of more extensive jurisdiction, perhaps no case can be shown of a person, from malice only, prose-

cuting a suit, the costs of which would inevitably fall on himself. But since the jurisdiction of justices' courts has been increased, many instances have arisen of persons being summoned from their homes, thirty or more miles, to defend themselves against a groundless demand, maliciously contrived to harass and perplex them. Unprincipled men have frequently boasted, on some real or imaginary injury, that they would be revenged on their antagonists by harassing them with feigned demands, before justices thirty or forty miles distant, as the costs would amount to a few cents only. If, then, not a solitary case could be found in any English reporter, nor even the principle in terms hinted at, I should not hesitate to say the action was maintainable on principles of common sense, common right and common justice." But the third member of the court concurred with KIRKPATRICK, C. J., and the action was dismissed.

"I agree," said SOUTHARD, J., "in opinion with the chief justice. The positions laid down by him I believe are law, and I cannot add to their elucidation. Originally when a false claim was made and a vexatious suit carried on, the plaintiff was subject to amercement, but he was not subject to damages in addition. That was considered sufficient, and it was not the notion of those days to prevent men from applying to courts for a redress of their grievances. After the amercement fell into disuse, the legislature interfered and gave costs; but for what purpose? To compensate the party for his ordinary and regular expenses in his suit, but not for any injury out of the usual and common course of proceeding in courts of justice. For such it did not pretend to apply a remedy. The legislature no doubt supposed that it had given costs enough to effect the purposes which it had in view. It did not intend that the party should come in, say that the provision was not ample enough, that the costs did not satisfy his expenses, and therefore claim damages by suit to correct the miscalculation of the legislature. It was alleged, however, in the argument at the bar, that in the court for the trial of small causes no costs are really received by the defendant for his own benefit and to pay his expenses; and therefore that he must be entitled to sue where he has been put to cost in that court. The reasoning is fallacious. In this as in every other court, the legislature have fixed what costs shall be given. If it was thought best that these costs should amount only to so much as the party was obliged to pay to

the officers and witnesses, &c., still it is a legislative determination of the matter, and parties have no right to object to it. Besides quite as much money does go into the pockets of the parties in that court as in any other. Parties nowhere put money into their pockets by bills of costs; they never remunerate them for time, labor or expense; they only amount to the sums lawfully due to the officers and witnesses. In every suit, no matter how regular or correct in law and justice, both plaintiff and defendant are compelled to submit to a considerable amount of expenses, which bills of costs can never reach nor ever were designed to reach. I cannot believe that the defendant can recover these expenses by suit, where he can prove that the plaintiff maliciously sued him. This would neither be lawful nor expedient. He must be able to show something more, as arrest or special grievance. Those cases which were cited to show that expense alone was sufficient to maintain the action, do not contradict this position. They are all criminal cases, or refer to and are founded on them. * * * It is not unlikely that some of the inconveniences which have been mentioned at the bar will result from the doctrine now established in the court for the trial of small causes. Unprincipled men are often to be found in every society who, for the sole purpose of vexing and harassing a neighbor who they dislike, will bring many malicious suits, if the only evil they are to suffer is the payment of costs in that court. But the contrary doctrine would lead to consequences not less unpleasant; and if this were not so we cannot here remedy the evil. By enlarging the jurisdiction of justices and giving almost nominal costs, the legislature have offered temptations to the malignant to bring vexatious suits. Higher costs would repress this feeling. It is only in that court that such suits are heard of. But the law I conceive to be clear, and if remedy be necessary it must come from a different authority from this court." See also *Allgore v. Stillwell*, 6 N. J. (Law) 166 (1822).
 40 N. J. 252

The latest case in the courts of this country, in which the topic of this article was passed upon, is *McNamee v. Minke*, 49 Md. 122, decided by the Court of Appeals of Maryland in 1878. The declaration stated that the defendant sued out an ejectment-writ commanding the sheriff to summon the plaintiff to answer the defendant in an action of ejectment; that in said action the defendant falsely and maliciously claimed of the plaintiff *all* of the

lot sued for (known as lot 6), when in fact he had no probable cause of action against the plaintiff for the whole of that lot; that the trial resulted in a verdict that the defendant should not take the whole of said lot, and that the plaintiff had been put to trouble and expense in defending said suit for which he claimed damages. Various questions of pleading were raised by the defendant. The court after disposing of them said: "But this record is inadmissible upon the broader and more substantial ground that, when considered in connection with the allegations in support of which it is offered, it fails to show such a prosecution as will maintain the present action. It is true a party may be held liable for a false and malicious prosecution of either a criminal or civil proceeding; but when it has been attempted to hold a party liable for the prosecution of a civil proceeding, it has generally been in cases where there has been an alleged malicious arrest of the person, as in the case of *Turner v. Walker*, 3 Gill & J. 377, or a groundless and malicious seizure of property, or the false and malicious placing the plaintiff in bankruptcy, or the like. * * * If the plaintiff declares that he has been falsely and maliciously arrested, or that by reason of a false claim maliciously asserted by the defendant he was required to give bail, and upon failure he was detained in custody or his property was attached, there the action lies because of the special damage sustained by the plaintiff. It is not enough, however, for the plaintiff to declare generally that the defendant brought an action *ex malitia et sine causa, per quod* he put him to great charge, &c.; but he must allege and show the grievance specially. Otherwise parties would be constantly involved in litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution."

VII. *The American Adjudications. The Action sustained.*—We pass now to the cases in which the courts of this country have intimated or expressly ruled that the action is maintainable.

Vanduzor v. Linderman, 10 Johns. 106, was decided in the Supreme Court of New York in 1813. The plaintiff sued the defendant before a justice for the loss of the service of his son whilst defending a certain suit brought against him by the defendant, and for money paid by the plaintiff in behalf of his son in and about defending the said suit. There was a trial by jury and a verdict for the plaintiff for \$3, for which the justice gave judg-

ment. The defendant appealed. *PER CURIAM*.—"No action lies merely for bringing a suit against a person without sufficient ground. To sustain a suit for a former prosecution it must appear to have been without cause and malicious, and an action for malicious prosecution is not cognizable before a justice. Judgment reversed." It will be observed that though the language of the court is broad enough to include an ordinary civil action, yet the case itself went off on a question of jurisdiction, and the expressions of the court are therefore *obiter*.

Pangburn v. Bull, 1 Wend. 345, which arose in New York in 1828, is the next case. The declaration alleged that P. not having any reasonable or probable cause of action against B., as he well knew, sued him before a justice of the peace in an action of trespass in the case; that B. appearing, P. after one adjournment discontinued the case, but immediately thereafter commenced another suit on the same claim, in which after a trial judgment was rendered against P. for the costs of the suit, whereby he was greatly damaged, &c. It was argued that there having been no arrest or holding to bail the action would not lie. But the Supreme Court thought differently, and affirmed the plaintiff's judgment for \$7.25, *WOODWARD, J.*, saying: "From an examination of the cases it appears that an arrest and holding to bail are not indispensably necessary in order to maintain an action for a malicious prosecution. It has been sustained in cases where there was neither an arrest or bail; and when it is considered that malice and the want of probable cause are the foundation of the action, it would seem on principle to reach cases where the injury would be equally great, although the proceeding did not require an arrest or bail." But all the cases cited by the judge were cases of "arrest or bail."

In *Whipple v. Fuller*, 11 Conn. 582, decided in Connecticut in 1836, the plaintiff's property had been attached in an ungrounded and malicious suit for slander, in which the defendant had been nonsuited, and he sued to recover damages. "The defendant," said *CHURCH, J.*, "claims that no action will lie at common law to recover damages sustained in consequence of being maliciously sued and prosecuted in an unfounded civil action, unless the body of the defendant in such action was arrested or holden to bail; neither of which was done in the vexatious suit complained of. This objection requires consideration. It certainly has received plausibility, if not direct countenance, from the remarks of some

learned commentators, as well as from the decisions of courts. * * * It seems to be conceded that when anything is done maliciously, besides merely commencing and prosecuting a malicious or vexatious action, a suit for damages sustained by such act may be maintained. And therefore it is that an action is sustainable for a malicious arrest or a holding to bail for too large a sum, and for maliciously suing out and levying a writ of *feri facias*. Upon the same principle an action may be maintained where the property of a party has been maliciously attached upon *mesne* process, under all jurisdictions where such attachments are known. But we wish to place our decision of this question upon broader principles; principles which we believe have received the sanction of the common law in its earliest ages. Before the statute which was passed in the fifty-second years of Henry III., no costs were recoverable in civil actions. This statute, and others subsequently enacted, gave costs to successful defendants, as it is said, by way of damages against the plaintiff *pro falso clamore*. Whatever might have been true when the several statutes giving costs were enacted, we cannot at this day shut our eyes to the truth known by everybody that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit; and of course this remedy is not adequate to repair the injury thus received; and the common law declares that for every injury there is a remedy. Before the statutes entitling defendants to costs existed, they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause. And this principle is and ought to be operative still in all cases where the taxation of costs is not an ample remedy. It is upon this principle, in part at least, that actions have ever been sustained for malicious criminal prosecutions, in which no costs are taxed in favor of the accused."

Cox v. Taylor, 10 B. Mon. 17, was determined in Kentucky in 1849. The action was for maliciously suing out and keeping up an injunction whereby the plaintiff was restrained from the use of his land for several years; but in rendering the judgment of the Court of Appeals, MARSHALL, C. J., said: "The action is essentially for a malicious prosecution, that is for the groundless institution and prosecution of a suit without probable cause. The common law did not give this action merely on the ground that the former plaintiff may have been unable to establish a claim

asserted by suit, although the decision of that suit might conclusively determine the injustice and wrongfulness of his claim. It allowed every man to pursue his claims by the established remedies, subject to no other burthens or penalties but such as were incident to the remedies themselves in case of failure, unless he had resorted to them not only without such actual grounds as would insure success, but without even probable cause or ground for the proceeding, and therefore presumably for the mere purpose of harassing or injuring the other party, either in respect to his life, liberty, property or reputation. And the principle is the same whether the malicious proceeding be a criminal prosecution or a civil suit. In either case the wrong consists not merely in the falsity and consequent injustice of the charge or claim, but in its being made by legal proceedings without probable cause, and therefore as the law decides from malicious motives alone."

In *Closson v. Staples*, 42 Vt. 209, decided by the Supreme Court of Vermont in 1869, it appeared that C. had signed a promissory note as surety for one K., payable to S. or bearer. K. paid the note at maturity, but S. failed to deliver it up, alleging that he had lost it, and K. afterwards enlisted in the army and died in another state leaving no property. S., after the decease of K., produced the note, claiming that it had not been paid, demanded payment of C., and threatened trouble if the matter was not settled. Subsequently S. procured one B. to commence a suit against C. on it, in which case judgment was finally rendered against B. on the merits. C. then brought an action against S. on these facts, alleging that he could not recover any of his taxable costs against B. as he was worthless, and that he had been put to "great trouble, annoyance and expense, in looking up witnesses, preparing his defence to said suit, and employment of counsel and attending said court, and other large expenses of time and money and teams." In the Supreme Court it was held that he was entitled to recover, WILSON, J., delivered an exhaustive opinion: "This is an action on the case for malicious prosecution of a civil suit," said the learned judge, "and the first question is whether the court erred in their refusal to charge the jury as requested by the defendant. The case states that the plaintiff introduced testimony tending to prove all the allegations of his declaration, and the necessary facts to entitle him to recover, except it was not proved that the plaintiff in this suit was arrested, or any property attached on the writ

in the suit mentioned in the declaration which S. caused to be prosecuted, but it was served on C. only by the officer delivering him a copy. The defendant requested the court to charge the jury that the action could not be maintained without proof that C. was arrested or his property attached in that original suit. This leads us to consider whether an action for malicious prosecution of a civil suit without reasonable or probable cause will lie where the process in the suit so maliciously prosecuted is by summons only. In England before the statute of Marlbridge no costs were recoverable in civil actions. It seems that before the statutes entitling the defendant in civil actions to costs, if the suit terminated in his favor, he might support an action at common law against the plaintiff if the proceeding was malicious and without probable cause. But in England, since the statutes which give costs to the defendant in all actions in case of a nonsuit or verdict against the plaintiff and in other stages of the cause, it seems that no action can be maintained merely in respect of a civil suit maliciously instituted, except in some cases under legislative provisions, and perhaps excepting cases where the defendant failed to obtain the ordinary costs owing to the insolvency of a third party in whose name the suit was prosecuted. It is said that those statutes give costs to successful defendants by way of damages against the plaintiff *pro falso clamore*. * * * There does not appear to be any conflict in the authorities that where anything is done maliciously, besides commencing and prosecuting a malicious or vexatious action, a suit for the damages sustained by such act may be maintained. * * * It is said in some of the cases that where the process in the malicious and unfounded suit is by attachment, an action will lie for the damage the party sustains, because in such case no cost is allowed which can be a compensation for the personal injury. But we think the fundamental principles and analogies of the common law, as laid down by the text writers and early decisions of the English courts, do not make the manner in which the service of the process was made essential to maintain the action. The common law declares that for every injury there is a remedy. * * * The early English cases show very clearly that before the statute entitling defendants to costs they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause. It would seem, however, from more recent decisions that the present English rule,

which restricts or limits the right of action for maliciously prosecuting civil suits without probable cause, stands mainly upon the ground that the costs which the statute provides the successful defendant shall recover are an adequate compensation for the damages he sustains, but under their rule it does not appear that the right of action is restricted to those cases where the process is by attachment. The justice or equity of the English rule, as a part of their system of jurisprudence, there is no occasion to consider. But in our own state not only the mode of process in civil actions, but also the general provisions of our statute for taxing costs to the defendant, when the suit terminates in his favor, are opposed to making it essential to sustain an action for the malicious prosecution of a civil suit without probable cause, that his body was arrested or his property attached. * * * Our statute by which the prevailing party recovers certain costs incurred in the prosecution or defence of a civil action, stands upon the ground that certain claims and rights, in respect to the matters in issue, are asserted that in the adjudication of which a civil action, when brought and prosecuted in good faith, is a claim of right; and in order to place the administration of the law upon reasonable grounds, in respect to the rights asserted and recoverable costs, the expenses of litigating the claims of the parties, over and above certain items of costs, which the statute allows the prevailing party to recover, should be borne by the respective parties by whom such expenses are incurred without regard to the result of the suit. But the system of taxing costs under our statute, except in a very few cases, was enacted with reference to suits brought and prosecuted in good faith. In suits so brought and prosecuted the defendant may be subjected, or he may subject himself, to expenses not recoverable, even if the suit terminates in his favor; but of this he has no legal ground to complain when the suit is brought and prosecuted in good faith, because it is the ordinary and natural consequence of a uniform and well-regulated system to which all parties in civil actions are required to conform. But where the action is brought and prosecuted maliciously, and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such cases the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff in such case has no legal or equitable right to claim

that the rule of law which allows a suit to be brought and prosecuted in good faith without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs only, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But where the damages sustained by the defendant in defending a suit maliciously prosecuted without reasonable or probable cause, exceed the costs obtained by him, he has and of right should have a remedy by action on the case."

In *Marbourn v. Smith*, 11 Kans. 554, decided by the Supreme Court of Kansas, in 1873, M. & L., as partners, had sued S. for slander, the case being dismissed at M. & L.'s costs. S. thereupon brought an action for malicious prosecution, and recovered judgment for \$75, which was affirmed on appeal. "The only question of law arising upon the last assignment of error," said VALENTINE, J., "is whether an action for malicious prosecution can be maintained in a case like the one at bar, where neither the person nor property was seized, nor bail nor security required, and the ordinary costs of defending the alleged malicious prosecution have been allowed. Our opinion upon this case has already been foreshadowed. We suppose that an action for malicious prosecution can be maintained in any case where a malicious prosecution, without probable cause, has in fact been had and terminated, and the defendant in such prosecution has sustained damage over and above his taxable costs in the case, (citing *Whipple v. Fuller*, 11 Conn. 582; *Closson v. Staples*, 42 Vt. 209; *Pangburn v. Bull*, 1 Wend. 345). At common law the defendant in such a case always had a remedy. Originally it was an action for malicious prosecution; subsequently it was amercement of the plaintiff, *pro falso clamore*. But now and in this state an amercement is abolished; the defendant must return to his original remedy of malicious prosecution. It is an old maxim that there can be no legal right without a remedy, and the legal right in such a case has always been recognised."

In *Woods v. Finnell*, 13 Bush 629 (1878), 17 Am. Law Reg. (N. S.) 689, decided in Kentucky, in January 1878, the declaration alleged that the plaintiff and defendant were both citizens of the county of Mercer, Ky.; that the defendant, for the purpose of annoying the plaintiff and subjecting him to unnecessary expense and trouble, falsely pretended to change his residence to the state

of Indiana, and that he actually went to that state, not for the purpose of residing there in good faith, but to enable him to institute a suit in the United States Circuit Court for the district of Kentucky, for an assault alleged to have been committed by the plaintiff on the defendant; that claiming his residence in Indiana, he falsely and maliciously, and without reasonable cause, instituted a suit against the plaintiff for the said assault; that a trial was had and judgment rendered against the defendant, and that the plaintiff was thereby put to great expense defending the suit, for which he claimed damages. A demurrer was sustained in the court below, but on appeal the judgment was reversed. Said PRIOR, J., "The action instituted in the United States Circuit Court being a civil action, the sole question in these cases is, can an action for malicious prosecution, or rather an action on the case, be maintained for the institution and prosecution, without probable cause, of a malicious and vexatious suit. The elementary books, in treating of the action for malicious prosecution, lay down the rule that there are three descriptions of damages, either of which is sufficient to support that action, and some one of them must appear or the action will fail: 1. To the person, by imprisonment; 2. To the reputation, by scandal; 3. To the property, by expense. (3 Cooley's Blackstone, and notes, 126; 2 Selwyn's Nisi Prius 252.) This rule was evidently established after the enactment of the Statute of Marlbridge, giving to the defendant his costs in the event the plaintiff was nonsuited or failed to recover; for at common law, prior to that enactment, such actions could be maintained whether the property of the defendant was seized or not, or whether he had incurred expense in defending it; and regarding, then as now, the bringing of a civil action to be a matter of right, the plaintiff was liable in damages for the malicious institution and prosecution of such an action without probable cause. After the statute giving costs to the defendant, it was held by the common-law courts that no action could be maintained on account of the institution and prosecution of a civil action without probable cause, and therefore no action could lie for a vexatious ejection. In all such cases the plaintiff must have gone beyond the proper remedy for the enforcement of his claim, such as procuring an illegal order of arrest or requiring excessive bail, before the action could be maintained. This entire doctrine is based on the idea that the plaintiff bringing the action is sufficiently punished, and the

defendant fully recompensed by the statute requiring the plaintiff to pay all the costs. We perceive no good reason for following this rule, and denying to the defendant a remedy when his damages exceed the ordinary costs of the action. The fact that a plaintiff has been subjected to the payment of costs *pro falso clamore*, is no recompense to the defendant when the latter has, by reason of the malicious proceeding on the part of the plaintiff, sustained damage. In cases where the plaintiff has mistaken his action, or been nonsuited, or where, by reason of some imaginary claim, he has seen proper to sue the defendant, it is not pretended that any action for damages can be maintained; but where the claim is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery for the expenses incurred and damages sustained, should be as fully recognised as if his property had been attached or his body taken charge of by the sheriff. While the damages may be less in the one case than the other, the legal right exists and some remedy should be afforded. If the facts alleged in these petitions are true, and they must be so treated on demurrer, it would be a singular system of jurisprudence that would admit the wrong and still withhold the remedy. Following the doctrine of the common law, that for every injury there is a remedy, we see no reason for denying a remedy to the plaintiffs in each of these cases; and where a party seeks a judicial tribunal for the purpose alone of gratifying his malice, he should be made to recompense the party injured for the damages actually sustained, and the courts should see that a remedy is afforded for that purpose."

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VIII. *Conclusion*.—We have now reviewed all the American cases, *pro* and *con*; and the weight of authority appears to be against the right of action for the unfounded and malicious prosecution of an ordinary civil action. With the majority are all but one of the text-writers we have cited—Swift, Townsend, Addison, and the editors of the American leading cases who follow the English adjudications: Mr. Weeks, who limits the right to "extremely vexatious suits where special damage has been actually suffered," and Judge COOLEY, who discourages the remedy without positively denying the right. On the other side is Mr. Hilliard, who evidently favors the action, but unfortunately relies upon cases which do not sustain it at all. Of the thirteen cases we

have just examined, three: *Taylor v. Wilson*, in New Jersey; *Thomas v. Rouse*, in South Carolina, and *McNamee v. Minke*, in Maryland—hold that the action is not sustainable *because* it is not; three—*Woodmansie v. Logan* and *Potts v. Imlay*, in New Jersey, and *Ray v. Law*, in the federal court, that it will not lie because the defendant has his costs, which, in England, is considered a sufficient remedy. In the New York case of *Vanduzor v. Linderman*, the opinion of the court is *obiter*, and at the same time far from clear, and in the Kentucky case of *Coxe v. Taylor*, the defendant complained of the malicious issuing of an injunction which had caused him special damage. In but five cases: *Pangburn v. Bull*, in New York; *Whipple v. Smith*, in Connecticut; *Closson v. Staples*, in Vermont; *Marburg v. Smith*, in Kansas, and *Woods v. Finnell*, in Kentucky, do the courts recognise that here there is a wrong for which there should be a remedy. But while the weight of authority denies the action, the weight of reason allows it. We have set out at length the argument of the courts *pro* and *con*, and no one can read them without being struck with the weakness of the position assumed by the majority of the American courts that have been called upon to deal with this question, and of the writers who have stated the law as they understood the decisions. Take away the reason upon which the English cases stand, viz., that the defendant's damages are assessed to him by his judgment for costs, and what remains to stand in the way of a remedy by action? Nothing at all. The English cases admit the wrong; they do not deny that for any substantial and special damage outside the costs of the defence, the defendant may recover in this form. Therefore, if his goods have been attached, or his person has been imprisoned, they allow a recovery; but where nothing of this kind has occurred they say to the debtor, "The law does not fail to recognise that you should be recompensed for the damages you have suffered in resisting a malicious and unfounded suit, and that your persecutor should be made to reimburse you. If you have been damaged beyond the ordinary costs of a lawsuit, this is the tribunal to which you may appeal. But if you have been damaged to that extent and no more, you can not come here, for Parliament has declared that these costs shall be assessed to you at the time you obtain your verdict, and in the form of a judgment against the plaintiff in the same suit." But there are few, if any, American courts that can address the

suitor in these terms. In England the allowance of costs is in the majority of cases, and as effectually as can be accomplished under a general rule, a complete satisfaction to a successful defendant. The costs taxed to him include his attorney's charges for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the *honorarium* of the barrister who conducted the case in court. The American system, as carried on in most of the states, gives to the defendant little or nothing beyond the costs of the suit. The English decisions have, therefore, no applicability here, and can only be followed by our courts to a ridiculous result. Two further arguments against the action remain, neither of which can stand an examination. It is said that, if such suits are generally allowed, litigation will become interminable, for every unsuccessful action will be followed by another, alleging malice in the prosecution of the former, and, secondly, that if the defendant may sue for damages sustained by an unfounded prosecution, the plaintiff may equally bring an action when the defendant makes a groundless defence: *Waterer v. Freeman*, Hobart 205 (1640); *Potts v. Imlay*, *supra*. In answer to the first objection it is enough to say that the action will never lie for an unsuccessful prosecution unless begun and carried on *with malice and without reasonable cause*. With the burden of this difficult proof upon him, the litigant will need a very clear case before he will be willing to begin a suit of this character. The second argument fails to distinguish between the position of the parties, plaintiff and defendant, in an action at law. The plaintiff sets the law in motion; if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights—the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege.

JOHN D. LAWSON.

St. Louis.

RECENT ENGLISH DECISIONS.

Court of Appeal.

MITCHELL v. HOMFRAY.

A gift from a lady to her medical adviser, even though the former had no independent advice, is only voidable; and if, after the relationship has ceased, she intentionally abides by what she has done, her executors cannot recover the gift from the medical adviser.

In an action brought by the executors of Mrs. G. to recover a sum of 800*l.* alleged by the defendant to have been given by Mrs. G. to him, it was admitted that at the time the gift was made the defendant was acting as Mrs. G.'s medical adviser, and that she had no independent advice of any kind. The jury found that the advance of 800*l.* was not a loan but a gift; that there was no undue influence on the defendant's part; that the relation of patient and medical man had come to an end more than three years before Mrs. G.'s death, and that after that relationship had come to an end, and any effect produced by it had been removed, she intentionally abode by what she had done. *Held*, that the gift was not void but voidable, and the defendant was entitled to judgment.

APPEAL from the judgment of STEPHEN, J., at the trial.

The action was brought by the executors of the will of Mrs. Geldard to recover the sum of 800*l.* from the defendant. The case was first tried at Durham Summer Assizes 1879, before STEPHEN, J., and a special jury. A verdict was then given for the defendant, and the Exchequer Division subsequently discharged a rule *nisi* for a new trial obtained by the plaintiff. On appeal, the Court of Appeal, at Westminster, set aside the verdict and ordered a new trial, the court suggesting the questions which might be left to the jury on the second trial. The case was tried a second time before STEPHEN, J., and a special jury at the Leeds Summer Assizes of 1880, when the following facts were proved: In the year 1871, Mrs. Geldard, as was alleged by the defendant, gave him two checks for 500*l.* and 300*l.* respectively, to enable him to buy a house. Mrs. Geldard was then living at Gainford, and the defendant was, and had for some time been, her medical man. The gift, according to the defendant's evidence, was made in accordance with the wish of Mrs. Geldard's husband, who had died some time previously, and whom the defendant had also attended for a long period as medical man. The defendant's evidence further was, that he volunteered to pay Mrs. Geldard a life

annuity of 40*l.*, and that he did so from the time of the gift to himself until her decease, Mrs. Geldard, on several occasions, signing receipts drawn up by the defendant in the following form : "Received from Dr. Homfray the sum of 20*l.* for half year's annuity, in consideration of a free gift of 800*l.*" In 1872 Mrs. Geldard left Gainford and went to reside at Barnard Castle, about eight miles distant, and the defendant then ceased to act as her medical man. She lived at Barnard Castle till her death in July 1876. It was admitted at the trial that Mrs. Geldard had no independent advice of any kind when the gift was made, and that at that time defendant was acting as her medical adviser.

The following questions were left to the jury by STEPHEN, J. :

1. Was the advance of 800*l.* a loan, or was it a gift? Ans. "A gift." 2. If there was a gift, was there undue influence in fact? Ans. "No." 3. Did the relation of patient and medical man between Mrs. Geldard and Dr. Homfray come to an end when she went to Barnard Castle in 1872, and did Mrs. Geldard, after that relationship had been ended; and after any effect produced by it had been removed, intentionally abide by what she had done? Ans. "Yes." 4. Was the signature of the receipts obtained from Mrs. Geldard by fraud? Ans. "No."

On these findings STEPHEN, J., directed judgment to be entered for the defendant.

The plaintiffs now appealed.

Digby Seymour, Q. C., and *Chadwyck Healey* (*Forbes*, Q. C., with them), for the plaintiffs.

A. Wills, Q. C. (*Canby* with him), for the defendant.

The LORD CHANCELLOR.—This cause has been argued very fully; but I myself should have been better satisfied to have dealt with both facts and law upon this hearing. It seems to me that a case of this nature, to be dealt with in a satisfactory manner, ought to present the whole of the facts for the court to form their opinion upon. But, unfortunately, this case was tried by a jury, and it comes before us in the only form in which a case that has been tried by a jury can come before us; that is to say, we can not look behind the findings of that tribunal. That is a very

embarrassing state of things, when we have to decide as to the application of an important principle of equity. I understand that when this case was before the Court of Appeals on a former occasion, BRAMWELL, L. J., strongly advised the parties not to go before a jury. However, the course that he recommended has not been taken. The case has been twice tried, and it would be a misfortune if we had to send the case to another jury. Before determining what the findings of the jury amount to, it is important to remember how the case came before the jury. This court, when the case came before it on a former occasion, had directed a new trial, and thrown out that the questions for the jury were: [Reads the questions put at the trial with the addition of one as to independent advice at the time of the gift.] Now, what took place at the trial was this. The point as to the independent advice was covered by the admission that Mrs. Geldard had no independent advice of any kind when the gift was made. That admission seems to have been intended to cover both the time of the gift and afterwards. The other questions were left substantially as had been suggested by the court; and at the trial neither side asked that any other question should be left. We have been pressed now with the argument that another question should have been left, namely, whether this lady was aware that the gift was impeachable? Now, it seems to me, that if it was going to be contended that the findings of the jury were useless unless that question was asked, the question ought to have been suggested to the judge at the trial. As it was not, we must consider that the parties intended to give the go-by to that question. So interpreted, the finding of the jury as to Mrs. Geldard intentionally abiding by what she had done, after the relationship of medical man and patient had ended, becomes of vital importance. I should have preferred an answer of the jury to the question as to her knowledge that the gift was impeachable. But I assume that there was no evidence of absence of knowledge on her part. The finding of the jury is that the relationship of patient and medical man between Mrs. Geldard and Dr. Homfray came to an end when she went to Barnard Castle in 1872, and that, after that and after any effect produced by that relationship had been removed, she intentionally abode by what she had done. I think that that must be taken to mean that, even if she had known that the gift was impeachable, she would still have adhered to it. There is not here a case of express

confirmation of the gift nor of simple acquiescence in it. But the gift being voidable and not void, and this lady being the person to determine whether it should be avoided or not, she determined not to avoid it. Now, although it is true that she had no independent advice when the gift was made, I think that no authority goes the length of saying that another person after her death may do that which she determined not to do. The case of *Rhodes v. Bate*, Law Rep., 1 Ch. Ap. 252, though it goes further than any other, laying down that wherever there is a confidential relationship the beneficiary must show not only that there was no impropriety in the gift, but that the donor had independent advice, does not go on to say that that is necessary if there is a deliberate intention to abide by the transaction after the influence has ceased, and any effect produced by the relationship has been entirely removed. There is not much authority to assist us in arriving at our decision, which is in favor of not disturbing this judgment; but there is some. The case of *Dent v. Bennett*, 4 Myl. & Cr. 269, was a case where the gift was set aside; but I find this passage in the judgment of the Lord Chancellor (COTTENHAM), at page 275: "There is an absence of all evidence of the testator having at any time recognised, or in any manner given any proof of approval of the agreement, or of any consciousness of its existence." That does not go far to show what the effects of such evidence would be; but at least it shows that it would have been a very material element in arriving at a decision in that case. In the case of *Wright v. Vanderplank*, 8 De G., M. & G. 183, TURNER, L. J., who delivered the judgment in *Rhodes v. Bate*, *supra*, says, at page 146: "A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice, or in some other way." I do not lay much stress on that; but I know of no reason for supposing that the law on this point, as between doctor and patient, differs from that as between parent and child. The lord justice continues: "When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is, whether there was a deliberate, unbiased intention on the part of the child to give it to the parent. Applying these considerations

to the present case, it is difficult to say that the present action could have been maintained if the case had rested upon the mere circumstances which attended the original gift. I think it could not. I am satisfied that the court would be departing from established principles in upholding it. The transaction had its inception at a period when the minority had just terminated. It was completed while the parental influence and authority was in full force, and there was no independent advice given to the daughter. The transaction, therefore, was impeachable at and after its completion; and the only question is, whether it has become unimpeachable by reason of what has subsequently occurred. It has been argued at the bar that it has not; for that some positive act was required to make it so, and here no such act has been done. I am not of opinion that a positive act is necessary to render the transaction unimpeachable. All that is required is proof of a fixed, deliberate and unbiased determination that the transaction should not be impeached. This may be proved either by the lapse of time during which the transaction has been allowed to stand, or by other circumstances. Here I have no doubt that there was a fixed, deliberate and unbiased determination on the part of the lady that the transaction should not be impeached." No doubt the fact of the subsequent marriage of the lady who was the donor in that case, and, indeed, the whole of her life, was consistent with that judgment. The lord justice continues: "It is stated on the face of the bill that the daughter had been informed by some of her friends before her marriage that a fraud had been practiced on her by the defendant. Now she was plainly a woman of strong understanding, and capable of transacting business, and it is impossible to suppose that she, having been told that a fraud had been practiced on her, should not have been aware that the courts could relieve her. And if it were possible to suppose this, the facts of the case exclude the supposition." Therefore, it must be taken in that case the donor knew as a fact that the transaction was impeachable. At the same time, that case is very near this one, if we may treat this case as if there had been a finding of the jury that the donor was indifferent whether she could set aside the gift or not, so that whether she knew or not would be immaterial: *In re Holmes's Estate*, *Woodward v. Humpage*, *Bevan's Case*, 3 Giff. Ch. Rep. 345-6, Sir JOHN STUART, V. C., says: "The law of this court as to gifts by a client to his solicitor, I think, is perfectly

established. The principle is, that the relation of solicitor and client is one of such high confidence on the part of the client, that the solicitor is considered to have an amount of influence over the mind and action of his client, which, in the eye of this court, while that influence remains, makes it almost impossible that the gift can prevail. The principle of influence vitiates the gift; but the presumption of influence may be rebutted by circumstances short of the total dissolution of the relationship of solicitor and client. That relation is only looked at as creating the influence; and, as soon as circumstances of evidence are introduced which remove all effect of the influence, whether the relation subsists or not, if the influence of that relation is removed, there is no incapacity on the part of the solicitor to become the object of his client's bounty, and to be the recipient from his client of a gift which will be valid at law and in equity." There the vice-chancellor supposes the relationship of solicitor and client to be still subsisting, but the influence of that relationship to be at an end. Here not only have the jury found that after the influence of the relationship of doctor and patient had come to an end the patient intentionally abode by her gift, but that she did so after the relationship itself had, in fact, ceased. I think that the principles laid down in the cases that I have cited justify us in affirming this judgment.

BAGGALLAY, L. J., and BRAMWELL, L. J., concurred.

Appeal dismissed.

The principal case brings up the subject of gifts between persons standing in confidential relations to each other. The subject thus presented is such that it may be interesting and useful to examine some of the fundamental principles which have been established in this connection.

At common law, a gift from the husband to the wife was void, but in equity such gifts were valid. If the gift was not prejudicial to the rights of creditors, it became her separate estate in equity, and was supported as such even against the husband, and without the intervention of a trustee. See *Slanning v Style*, 3 P. Wms. 338 (1734); *Lucas v. Lucas*,

1 Atk. 270 (1738); *McLean v. Longlands*, 5 Ves. 79 (1799); *Wallingsford v. Allen*, 10 Peters 583 (1836); *Adams v. Brackett*, 5 Met. 285 (1842); *Savage v. O'Neil*, 44 N. Y. 298 (1871); *Gill v. Woods, Admr.*, 81 Ill. 64 (1876); *Davis v. Zimmerman*, 40 Mich. 24 (1879); *Richardson v. Lowry*, 67 Mo. 411 (1878); *Conley v. Bentley*, 87 Penn. St. 40 (1878); *Fresch v. Wirtz*, 34 N. J. Eq. 124 (1881); *Wheeler v. Wheeler*, 43 Conn. 507 (1876); *Davidson v. Lanier*, 51 Ala. 318 (1874).

The gift is her equitable separate estate, and is not within the influence and operation of the statutory or constitutional provisions creating a statutory

separate estate: *Helmetag v. Frank*, 61 Ala. 69 (1878); *McMillan v. Teacock*, 57 Id. 127 (1876), and cases there cited. And, though a conveyance from a stranger to a *feme covert*, in order to vest in her a sole and separate estate, must contain words indicating such an intention, such words are unnecessary in a transfer from husband to wife: *Dening v. Williams*, 26 Conn. 226 (1857).

In *Greenfield's Estate*, 24 Penn. St. 232, 240 (1854), the Supreme Court of Pennsylvania says: "We know of no rule of law or morals which will prevent clergymen from receiving gifts, great or small, even from their parishioners." And in the recent case of *Audenreid's Appeal*, 89 Id. 114 (1879), the same court declares that, "There is nothing in the confidential relation of a medical adviser to a patient that *per se* forbids the acceptance of a gift from his patient." As between an attorney and his client, however, the rule seems to have been different. As early as the year 1784, in *Welles v. Middleton*, 1 Cox's Ch. 112, 124, we find the lord chancellor declaring: "In the case of attorneys, it is perfectly well known that an attorney cannot take a gift while the client is in his hands, nor instead of his bill. And there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands if it was not so; but once extricate him, and it may be otherwise." And in *Montesquieu v. Sandys*, 18 Ves. 312 (1811), Lord ELDON said: "An attorney shall not take from his client a gift or reward while standing in that relation, the connection between them subsisting with the influence attending it, though the transaction may be as righteous as ever was carried on; the connection must, as in the instance of guardian and ward, be *bona fide* dissolved before he can take anything beyond his regular fees." See, too, *Proof v. Hines*, Ca. temp. Talbot

111, 116 (1735); *Bellaw v. Russel*, 1 Ball & B. 96 (1809); *Falkner v. O'Brien*, 2 Id. 214 (1812); *Lady Ormond v. Hutchinson*, 13 Ves. 47, 51, 52 (1806); *Hylton v. Hylton*, 2 Id. 548, 549 (1754). Hence, we find the Supreme Court of Tennessee declaring that, "It is a settled rule, therefore, that, while the relation of attorney and client exists, the attorney stands in such a situation of confidence that he will not be permitted to take from his client beyond a fair professional demand." *Rose v. Mynatt*, 23 Tenn. 36 (1834). In *Starr v. Vandereyden*, 9 Johns. (N. Y.) 253 (1812), the court ruled that a confession of judgment, made by a client in behalf of his attorney, could not be permitted to stand, except as a security for fees actually due for services rendered. See, also, *Bibb v. Smith*, 1 Dana (Ky.) 580 (1833), and *Kirby v. Taylor*, 6 Johns. Ch. (N. Y.) 248 (1822). It is to be observed, however, that in the later cases it seems to be conceded that the attorney may receive a gift from his client, while the relation continues to subsist, which, under certain circumstances, will be valid both at law and in equity. Such a concession is made in *Bevan's Case*, 3 Gifford Ch. 345, 346 (1861), and cited in the principal case, although the concession is accompanied with the statement "that it is almost impossible that the gift can prevail." Similar concessions will be found elsewhere: *Jennings v. McConnel*, 17 Ill. 148 (1855).

A well-defined distinction exists between the validity of gifts *inter vivos* and legacies. The influence which avoids gifts *inter vivos* between persons having confidential relations will not of necessity avoid legacies between such persons. In *Purfitt v. Lawless*, 2 Prob. & Div. 462, 469 (1872), Lord PENZANCE says: "In the case of gifts or other transactions *inter vivos*, it is considered by the courts of equity that the natural influence which such relations as those in question involve, exerted by those

who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore, set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that the persuasion stop short of coercion, and that the volition of the testator, though biased and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another." And the existence of this distinction has been recognised in two recent cases in this country: *Griffith v. Diffenderffer*, 50 Md. 468, 484 (1878), and *Haydock v. Haydock*, 34 N. J. Eq. 570, 575 (1881). But this distinction is itself conditioned; and if it is made to appear that the testator was of weak mind, and that a bequest was made to a person standing in a position which enabled the beneficiary to influence the act, the burden shifts, and the will cannot be admitted to probate unless the court is satisfied that the paper presented actually expresses the true will of the testator: *Haydock v. Haydock*, *supra*. And where a will has been made by a ward in favor of the guardian, it has been held that the burden of proof was on the guardian: *Garvin's Admr. v. Williams*, 44 Mo. 465 (1869); *Meek v. Perry*, 36 Miss. 190; *Morris v. Stokes*, 21 Ga. 552 (1857).

In relation to gifts *inter vivos*, a dis-

tinction is taken between persons occupying confidential relations and those who do not occupy such relations. In the latter class of cases it has been said that the donee must, if the transaction is questioned, show that the donor knew and understood what he was doing: *Hoghton v. Hoghton*, 15 Beav. 278, 299 (1852). But in the case of persons standing in confidential relations to each other, it is presumed that an undue influence has been exerted by the donee over the donor. And it must be made to affirmatively appear not only that the donor knew and understood what he was doing, but that no advantage was taken of the relation of the parties to unduly influence the donor. According to *Rhodes v. Bate*, L. R., 1 Ch. App. 252 (1865), cited in the principal case, it was "a settled general principle" that "persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." The principal case now comes in to determine that it is not absolutely essential that there should have been independent advice, but that the gift may be sustained if, after the confidential relation has terminated, the donor intentionally abides by what he has done for a sufficient period of time to show a fixed, deliberate and unbiased determination that the gift should not be impeached. In settling this principle, an important question is determined, and the principal case is accordingly valuable, and will hereafter be regarded as a leading case on this subject. The principle referred to in *Rhodes v. Bates*, *supra*, as being "settled" that it was essential that there should have been independent advice in order to sustain the gift, was announced at least as early as 1818 in *Griffiths v. Robins*, 3 Madd. 191. In

that case the donor was eighty-four years old, and nearly blind, so as to be altogether dependent on the kindness and assistance of others, and especially upon the kindness of the donees, a niece and her husband. The court declared the intervention of a third person necessary, and, as there had been no such intervention, the deed of gift was ordered to be delivered up. In *Pratt v. Barker*, 1 Sim. 1 (1826), a deed of gift from a patient to his medical adviser was sustained, a third party having intervened.

The cases are very numerous in which equity has set aside gifts between persons occupying confidential relations. In *Norton v. Relly*, 2 Eden 286 (1764), Lord Northington, on grounds of public policy, set aside a deed of gift from a parishioner to his spiritual adviser, declaring that it was the first case of the kind which had been decided "in any court of judicature in this kingdom." In *Nottidge v. Prince*, 2 Giff. 246 (1860), we have another illustration of the same principle. In that case the vice-chancellor took occasion to say: "No person who stands in a relation of spiritual confidence to another, so as to acquire a habitual influence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence, without the danger of having the gift set aside. If it can be shown that a sufficient protection has been interposed against the exercise of the influence, there may be a case to sustain the gift. But the principle prevails where there exists a relation which naturally creates influence over the mind. Therefore, the doctrine extends to the relation of attorney and client, of guardian and ward, of parent and child. But there does not arise from any of these relations an influence so strong as that of a minister of religion over a person under his direct spiritual charge." See, also, *Huquenin v. Baseley*, 14 Ves. 273 (1807).

In *Kirwan v. Cullen*, 4 Irish Ch. 322

(1854), the High Court of Chancery in Ireland sustained a deed of trust made by a Roman Catholic lady to a Roman Catholic archbishop. But the archbishop had never seen her, and denied that she was under his spiritual influence. Neither had the gift been obtained at the suggestion of her spiritual adviser.

As between parent and child, the cases are numerous, and among them reference may be had to the following: *Archer v. Hudson*, 7 Beav. 560 (1844); *Carpenter v. Heriot*, 1 Eden 338 (1758); *Young v. Peachy*, 2 Atk. 254 (1741); *Heron v. Heron*, Id. 160 (1741); *Cocking v. Pratt*, 1 Ves. 401 (1749); *Baker v. Bradley*, 2 Sm. & G. 531 (1854); *Potts v. Surr*, 34 Beav. 543, 555 (1865); *Whelan v. Whelan*, 3 Cow. 587 (1824); *Bergen v. Udall*, 31 Barb. 9 (1858); *Highberger v. Stiffler*, 21 Md. 339 (1863).

A deed of gift from the parent to the child stands on a different footing, and will not be subjected to the same jealous scrutiny as a similar deed from the child to the parent. See *Howe v. Howe*, 99 Mass. 88 (1868); *Greer v. Greer*, 9 Gratt. (Va.) 332 (1852); *Potts v. Moore*, 67 Mo. 192 (1877). But where the relation of parent and child is reversed by reason of age, or for some other cause, and the parent has become dependent on the child, the rule will be applied in all its strictness: *Mulock v. Mulock*, 31 N. J. Eq. 594, 602 (1879).

For cases in which gifts between guardian and ward, made by the latter, shortly after the relation has been terminated, have been set aside in equity on grounds of public policy, reference may be had to the following authorities: *Hatch v. Hatch*, 9 Ves. 292 (1804); *Hylton v. Hylton*, 2 Ves. Sr. 547 (1754); *Duke of Hamilton v. Lord Mohun*, 1 P. Wm. 118 (1701); *Dawson v. Massey*, 1 Ball & B. 219 (1809); *Aylward v. Kearney*, 2 Id. 463 (1814); *Everitt v. Everitt*, L. R., 10 Eq. 405 (1870); *Say v. Barnes*, 4 S. & R. (Penn.) 112 (1818); *Elliot v. Elliot*, 5 Binn.

(Penn.) 1 (1812); *Wills's Appeal*, 22 Penn. St. 325, 332 (1853); *Eberts v. Eberts*, 55 Id. 110 (1867); *Gale v. Wells*, 12 Barb. (N. Y.) 84; *Garvin v. Williams*, 44 Mo. 465 (1869); *Sullivan v. Blackwell*, 28 Miss. 737 (1855). And for relief from gifts bestowed by a patient upon his medical adviser, reference may be had to the following: *Dent v. Bennett*, 7 Sim. 539 (1835); *Popham v. Brooke*, 5 Rus. 8 (1828); *Gibson v. Russell*, 2 Y. & C. 104 (1843); *Billage v. Southee*, 9 Hare 534 (1852); *Cadwalader v. West*, 48 Mo. 483 (1871). As to cases where gifts between an attorney and his client have been set aside, a reference may be had to the cases already cited upon that subject.

But the relation of parent and child, of guardian and ward, of spiritual adviser and parishioner, of physician and patient, of attorney and client, are not the only relations in which undue influence will be presumed. As Lord COTTENHAM declared in *Dent v. Bennett*, 4 My. & Cr. 277 (1839), the relief which equity affords in such cases "stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another." See too *Lyon v. Home*, L. R., 6 Eq. 655 (1868); *Haydock v. Haydock*, 34 N. Y. Eq. 570, 574. The principle has been applied as between brother and brother: *Todd v. Grove*, 33 Md. 188 (1870); and sister and sister: *Harvey v. Mount*, 8 Beav. 439 (1845); and brother and sister: *Boney v. Hollingsworth*, 23 Ala. 690, 698 (1853).

A court of equity never lends its aid at the instance of a donee to reform a voluntary deed: *Turner v. Collins*, L. R., 7 Ch. App. 342 (1871); *Groves v. Groves*, 3 You. & Jer. 163 (1829); *Lister v. Hodgson*, L. R., 4 Eq. Cas. 30 (1867); *Mulock v. Mulock*, 31 N. J. Eq. 594 (1879). It will not enforce specific performance of a voluntary con-

tract: *Fry Specif. Perf.* 70, 71; *Wadhams v. Gay*, 73 Ill. 415 (1874); *Hoig v. Adrain College*, 83 Id. 267 (1876). But a mere gift or voluntary agreement, when once executed, cannot be revoked: *Welsch v. Bellerille Savings Bank*, 94 Ill. 191 (1879). And the principle was determined as early as 1682, in *Villers v. Beaumont*, 1 Vern. 100, that where the donee does not stand in a fiduciary or confidential relation towards the donor, equity will not set aside a voluntary deed at the suit of the grantor, however improvident it may have been, if it was free from the imputation of fraud, surprise or undue influence. In that case the lord chancellor declared that, "If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put upon himself, but he must lie down under his own folly." See also the recent case of *Wilemin v. Dunn*, 93 Ill. 511 (1879).

In concluding this note attention is called to the principle that in order to make a gift voidable, or such as equity will set aside, it is not necessary that the donee should have exerted the undue influence. It is enough that such influence was improperly exercised by a third person. Lord Chief Justice WILMOT declared in 1757 in *Bridgeman v. Green*, *Wilmot's Opinions* 58, 64, 65, that "whoever receives it (the gift) must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends, will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it." See also *Huguenin v. Baseley*, 14 Ves. 273, 288 (1807); *Whelan v. Whelan*, 3 Cow. 587 (1824).

HENRY WADE ROGERS.

RECENT AMERICAN DECISIONS.

Supreme Court of Georgia.

MILLEN v. GUERRARD.

Where a testator directs the income of shares of stock to be paid to one for life with remainder to other parties, dividends declared on the stock during the life-tenancy go to the life-tenant and not to the remainderman.

The facts that the dividends are unusually large, that they consist of accumulations of profit withheld during past years, and that they are declared in the form of certificates of indebtedness of the corporation, will not prevent them from becoming the property of the life-tenant if they are intended by the corporation as a distribution of income.

Under a provision of the Code that "the natural increase of the property belongs to the tenant for life; any extraordinary accumulation of the *corpus*, such as issue of new stock upon the shares of an incorporated or joint stock company, attaches to the *corpus* and goes with it to the remainderman," dividends whether ordinary or extraordinary, if they represent a distribution of the income of the stock, go to the life-tenant.

APPEAL from Chatham County.

William D. Hardin, for plaintiff in error.

G. C. Whatley, A. R. Lawton, Cunningham & Lawton, and
W. S. Basinger, for defendants in error.

The opinion of the court was delivered by

JACKSON, C. J.—Certain shares of Central and Southwestern Railroad stock were left by the will of Mrs. Millen to Guerrard, in trust for George R. Millen and his children, the income to be paid to Millen during life, and remainder to his children, with contingent remainder over in the event of their death. After probate of this will, the directors of the Central Railroad Company declared a dividend in certificates of indebtedness (in addition to a cash dividend) of \$30 per share on the Central and \$32 per share on the Southwestern stock, the Central Railroad having leased the latter road some years before on certain terms specified in the lease. The question made in this case is: Do these dividends go to George R. Millen, the life-tenant, or to the remaindermen? The will directs the income of the stock to be paid to the life-tenant. Are dividends of stock the income of stock? If not, what are they? They are certainly no part of the *corpus*. They do not increase the shares one iota. Nor could these dividends have been so applied by the directors as to add to the *corpus*, that is, to increase the stock, because the limit upon the number of

shares allowed the company by its charter is exhausted. These dividends could not be so used as to increase the *corpus*, and hence the directors declared the dividends, and gave them to the stockholders as dividends, and not as *corpus*. What did the testatrix mean when she gave to George R. Millen for life the income of this stock? Most clearly she meant the dividends declared by the directors; for there is, there can be, no income from the stock of a railroad company except the dividends declared thereon. Nor does the testatrix limit the amount or value of this income to be enjoyed for life by this life-tenant. It matters not how little or how large the dividend declared, it is income from the stock, and it goes to the life-tenant. No matter in what it be declared, whether in cash or in bonds, no matter whether it be the accumulation of years or of one year, if it be the income from the stock, and not the *corpus*, the stock itself, by the terms of the will, which is the law of the case, it goes to the life-tenant. No matter what, therefore, may be the law in respect to cases generally, which may arise under this action of the directors of the Central Railroad Company, in this case, under this will, these dividends, in the shape of these interest-bearing certificates, are income, and not *corpus*, and go to the life-tenant, and not to the remaindermen.

But suppose that the will be not in the case, and that by any sort of deed or instrument of conveyance this stock were the property of one for life, and of others in remainder, where would these dividends go? Whose property would they then be? That question will turn on the resolutions of the directors and the Code of this state, that is, upon the true meaning and construction of those resolutions, and of section 2256 of the Code. The resolutions show that dividends due these shares of stock had been "withheld" for past years, that the owners of the stock had not received anything "to represent their dividends and income thus withheld," and that, therefore, these certificates of indebtedness are issued. Clearly, therefore, these certificates represent, as declared on the face of the preamble and resolutions, past dividends withheld, and are declared in lieu of those dividends and that income from this stock which were withheld. It is as much as to say that the income from this stock was made in certain years, but not declared in those years for prudential reasons; those reasons do not now exist; therefore, this, the income of those years, will be declared as dividends now and be paid now. Suppose it had been declared

in cash, would there be a doubt that the cash would be the money of the life-tenant? We think not.

Suppose it had been declared in bonds of other persons, of the state, or the United States, or a city, or other railroad corporation, would it not go just as cash would have gone? Most certainly, it seems to us. What difference, then, can it make if the company gave its own bonds, or evidences of debt, as dividends representing part income? None, logically, so far as we can discern it. The directors thus calling these certificates of indebtedness dividends, and issuing them as dividends, we come to the question, where do they go under the Code of Georgia—to the life-tenant or to the remainderman? The Code, section 2256, enacts that "The natural increase of the property belongs to the tenant for life. Any extraordinary accumulation of the *corpus*—such as issue of new stock upon the shares of an incorporated or joint stock company—attaches to the *corpus*, and goes with it to the remainderman." Are dividends, though unusually large, because withheld when they might have been declared but for prudential reasons, an extraordinary accumulation of the *corpus*, or are they the natural increase of the property, in the sense of this statute? We take it that the words "natural increase" are used in antithesis to the subsequent words, "extraordinary accumulation," and they mean the ordinary accumulation of the property; that is, in case of stock, the ordinary increase of its value by larger dividends declared, whereby it may be worth much more in the income of the holder from it, goes to the life-tenant; but any extraordinary increase or accumulation, by donation or grant from the state of lands, or other outside property, will go to the remainderman.

That property thus accumulated, not from the ordinary use of the means of the company, but from extraordinary outside accumulations attaching to the former means or *corpus* of the company, and adding to that *corpus*, or those means, assimilates with that, becomes part of it, makes it larger and productive of more fruit, and can not be cut off by the life-tenant, but must stand tied to the *corpus*, and with the *corpus* pass to the remainderman.

But really dividends are the ordinary, the natural, the only natural income or increase of this sort of property. There can be no natural birth from this parent, except dividends be born of her womb. Railroad stock produces that naturally, in the very order of its creation, according to the very law of its existence, breathed into

it by the legislature when it became a living entity. Its maker then said to it: "Be fruitful and multiply dividends." So that according to its organic nature, it makes and distributes dividends; and their birth is no more extraordinary than that of a child from healthy parents, and the issue of large dividends no more extraordinary or unnatural than the birth of twins. We think, therefore, that these terms, "natural" and "extraordinary," are not in the way of carrying into effect the intention of the testatrix and of the directors. Nor are the words, "such as issue of new stock upon the share of an incorporated or joint-stock company." They are a mere illustration of extraordinary accumulations.

The issue of new stock is not an ordinary increase. It is not a natural increase. In this case it would have been very unnatural, because the law of the creation of this corporation prohibited this issue. The corporation must receive new powers from its maker before it could do this extraordinary, and as it now stands chartered, wholly unnatural and illegal thing. It could not declare new stock, but it could declare any number and amount of dividends. Besides, the *corpus* of this property is the shares of this stock. The only way to accumulate on this *corpus* is to increase these shares. If this corporation had possessed the power to do so, and had carried out that power, then the new stock would have assimilated to the old, become part and parcel of the *corpus*, and could not have been severed from it by the life-tenant; but by the Code it would have gone over to the remainderman. Nor do we see any other possible way of adding to this *corpus*—the old stock—except by the issue of new stock. That is the only thing that can accumulate in kind on it, and assimilate and become corporate with it. Bonds of the company, or promissory notes of it, or certificates of indebtedness by it, are not accretions to its stock, nor in any legal sense part of its *corpus*. Indeed they are just the opposite. They are burdens upon it. They are debt, which the natural fruit of the *corpus* will have to pay, instead of new stock engrafted on the old to produce more fruit. So that on mature reflection we are of the opinion that these certificates of indebtedness, principal and interest, are the property of the life-tenant; and the judgment of the court below denying the injunction is affirmed.

The respective interests of a life-tenant and remainderman in stock, is a subject which has given rise to a number of very difficult and interesting legal problems,

the solution of which it is to be feared has not yet been satisfactorily reached. From time to time during the continuance of a life tenancy, certain benefits are usually conferred by the corporation upon the various holders of its stock. In addition to the division of the profits at stipulated intervals in the shape of ordinary dividends, it occasionally distributes further sums constituting what are known as extraordinary dividends or bonuses. Sometimes it divides a portion of its surplus profits in the form of a stock dividend. Sometimes it sells a portion of its franchises or property and distributes the proceeds among its stockholders. Sometimes it increases its capital by the issuing of new stock, the option of subscribing to which is granted to the stockholders. If the affairs of the corporation be prosperous this option can often be sold in the market so as to realize a handsome profit. Or if the stockholders elect themselves to subscribe to the new stock, they often find it worth in their hands, at once, more than the amount laid out for its purchase.

The question frequently arises, to whom shall these various benefits—dividends, bonuses, stock dividends, proceeds of corporation property or franchises and options—be adjudged to belong? Are they properly to be deemed as belonging to the life-tenant, or are they to be capitalized and retained intact for the remainderman? The object of this note is to present in compact shape the leading principles by which the courts have been guided in their adjudications upon this subject. A life-tenant of real or personal property generally is entitled only to the income or interest accruing during the period of his tenancy. This rule obtains equally with regard to stock as it does to other property. A life-tenant of stock is therefore entitled only to the "income" arising during his life. And whether the will or deed by which his life estate is

created provides that he shall have the "income," or the "dividends," or "the dividends and profits," or "the dividends, interest and profits," or "the interest, dividends, profits and proceeds," there is no substantial difference as to his rights, the phrases being generally considered identical in effect: *Hooper v. Rossiter*, 1 McL. 527.

Of course if the will or deed in question clearly indicates an intention on the part of the testator or settlor that the life-tenant shall have other and broader rights, this intention will be strictly carried out: *Ward v. Combe*, 7 Sim. 634; *Cuming v. Boswell*, 2 Jur. (N. S.) 1005; *Balch v. Hallet*, 10 Gray 402; *Reed v. Head*, 6 Allen 174; *Clarkson v. Clarkson*, 18 Barb. 646. In the great majority of instances, however, no such clear intention appears, and resort has therefore to be had to legal principles to determine what the "income" is. The statement of these principles will be best understood by considering in succession the various classes of benefits conferred by the corporation upon its stockholders:

I. *Dividends*.—At certain stipulated periods most corporations are in the habit of dividing their profits or some part of them, earned since the previous stipulated period, among their stockholders. The sums which are thus periodically distributed are of course not constant in amount. Sometimes they are larger, sometimes smaller, according as the profits of the corporation have been large or small. But however great or insignificant they may be, the receipt of them at the usual periods is always looked forward to by the stockholders as a natural incident of their ownership. These constitute what are known as the ordinary dividends of a corporation. They are to be clearly distinguished from another class of dividends occasionally declared. These are such as are extraordinary in their nature, usually declared out of the

accumulated profits, not at certain stipulated periods, but at irregular intervals, whenever and in such amount as the corporation sees proper. These are termed bonuses or extraordinary dividends. The receipt of them cannot be looked forward to with confidence by the stockholder at any particular period. The true test whether a dividend is ordinary or extraordinary is not the fund from which it is derived. Ordinary dividends are sometimes declared out of accumulated profits, and extraordinary dividends out of the profits of the preceding year or half year. The sole test is what was the intent of the corporation declaring it. If the terms of the corporate resolution passed for that purpose, as seen in the light of the surrounding circumstances, seem to contemplate the distribution of an ordinary dividend, it will not be deemed an extraordinary one simply because it is larger than usual in amount: *Barclay v. Wainwright*, 14 Ves. 66; *Price v. Anderson*, 15 Sim. 473. Nor will the use of the word *bonus* make the dividend an extraordinary one, if a contrary intent is to be inferred from all the circumstances of the case: *Preston v. Melville*, 16 Sim. 163; *Johnson v. Johnson*, 15 Jur. 714. All ordinary dividends declared during the life-tenancy, no matter from what source derived, are to be considered as income, and are therefore the property of the life-tenant: *Hooper v. Rossiter*, 1 McL. 527. Nor does it make any difference that the profits out of which they are declared were earned prior to the inception of the life-tenancy: *Bates v. Mackinley*, 31 Beav. 280. Ordinary dividends so far partake of the nature of interest that from time to time endeavors have been made to apply to them the principle of apportionment. Where, therefore, for example, stock is bequeathed, and the testator dies between the dividend days, it has been contended that the legatee is entitled only to that portion of the next

dividend declared which may be considered as having accrued since the testator's death. A like contention has been made where stock has been settled for life with remainder over and the life-tenant dies between the dividend days. The general rule of law forbids such apportionment as inconvenient, and awards all ordinary dividends to those during the existence of whose estates they are declared: *Earp's Appeal*, 4 Casey (Pa.) 368, 374; *Clapp v. Astor*, 2 Ed. Ch. 319. In England, however, such apportionment is enjoined by Statute 4 & 5 William IV., c. 22, and by Statute 33 & 34 Vict., c. 35, sect. 2; *In re Maxwell's Trusts*, 1 H. & M. Ch. 610; *Hartley v. Allen*, 4 Jur. (N. S.) 500. But these statutes refer exclusively to dividends on corporation stock, and will not apply in case of *quasi* dividends of a private partnership: *Jones v. Ogle*, L. R., 8 Ch. App. 192.

Another question with relation to ordinary dividends is sometimes litigated between the life-tenant and the remainderman. "Where the stock is sold for reinvestment between the dividend days then of course the money you get for the sale is so much more in proportion to the time that has elapsed between the last dividend day and the next dividend day. Therefore the price you get is compounded partly and chiefly of the value of the stock itself, and partly of the value of that portion of the dividends which may be considered as apportioned to the period which has elapsed since the last dividend day:" *Scholefield v. Redfern*, 8 L. T. R. (N. S.) 487. In such case it has been contended on behalf of the life-tenant that the value of the stock itself alone should be regarded as capital, and that the amount by which the purchase-money is augmented in consequence of the proximity of the next dividend day should be deemed income, and therefore paid over to him. But the administration of such an equity would be a practical im-

possibility. The amount of the forthcoming dividend can never be precisely known, and the price of stock in the market is liable to be affected by a thousand contingencies which bear no possible relation to the time when that dividend falls due. How then can it be determined what portion of that price is to be set down to the account of accrued dividend? "The reason why such an equity has never been administered habitually," says V. C. KINDERSLEY, "is the serious and grievous burden it would impose to enter into such a complicated question as it would involve." *Scholefield v. Redfern, supra*. The principle, however, is undoubtedly correct, and if a satisfactory result can be obtained as to the elements of the price it will be applied. Where, therefore, stock was sold for reinvestment, and delivered only two days prior to the closing of the transfer books of the corporation preparatory to declaring a dividend, it was held that a sum equal to the whole of that dividend should be deducted from the purchase-money and paid to the tenant for life, on the ground that it was clear under the circumstances that the price of the stock itself had been augmented by just that amount: *London-desborough v. Somerville, 19 Beav. 295*.

II. *Extraordinary Dividends or Bonuses and Stock Dividends*.—It is not always the policy of a corporation to divide all its profits among its stockholders as quickly as they are made. Prudence will usually dictate the setting apart from time to time of a portion of those profits to constitute a reserve or surplus fund, of which the corporation may make such use as it sees proper. Sometimes it employs this fund, or a portion of it, in making permanent improvements upon its property, so as to facilitate and extend its business. Sometimes it expends it for the acquisition of new property, either real or personal, which may have become essential or desirable to carry out the purposes of

the charter. Sometimes it simply retains the fund, and allows it to accumulate, in order to insure public confidence in the full ability of the corporation to meet its obligations. Occasionally the further retention and accumulation of such a fund becomes, for some reason, unnecessary, and the corporation then makes a division of the whole or a part of it among its stockholders. This it may do in the shape of an ordinary dividend. Usually, however, it does so in the shape of an extraordinary dividend or bonus. Sometimes it happens that the surplus fund, being either needed or spent for the acquisition or improvement of property, it is considered desirable to issue new certificates of stock gratuitously to the various stockholders in an amount equal to the sums thus needed or expended. In this way the accumulated profits become, as far as the corporation is concerned, new capital. The shares issued to represent this new capital constitute a stock dividend.

Where bonuses and stock dividends are declared during the existence of a life-tenancy, frequent litigation has occurred between the life-tenant and the remainderman as to their ownership. It is often the case that a part of the profits out of which they are declared were earned prior to the death of the testator by whose will the stock was bequeathed, prior to the execution of the deed by which it was settled, or prior to the investment in such stock of the property in which by such deed or will the life-tenancy has been created.

Numerous cases arose in England upon this state of facts in the early part of the century. In all of them it was contended that so much of the bonus or stock dividend as consisted of profits which had accrued during the life-tenancy and since the investment, should be deemed income and awarded to the life-tenant, and that the rest, consisting of profits which had accrued before that time,

should be deemed capital, and should be invested anew, the interest to be paid over to the life-tenant, but the *corpus* to be kept intact for the remainderman. The correctness of the principle thus contended for does not seem to have been disputed by the courts, but the difficulties which lay in the way of the necessary investigation as to when the various parts of the profits out of which the bonus or stock dividend was declared had accrued, prevented its practical application. Without invoking any particular principle, therefore, the courts cut the Gordian knot by awarding every bonus and stock dividend to the *corpus* of the estate. "If I am to go upon your principle," said Lord LOUGHBOROUGH, in reply to the argument of the life-tenant's counsel in *Branden v. Branden*, 4 Ves. 800, "I must hunt it back, and see to what part of the saving each is entitled. I have often considered this question, and it always seemed to me, in all the different ways that I could turn the consideration of it, that there was no way to be taken but to consider it as an accretion to the capital, and the tenant for life will have the benefit of the dividends." This case was the first of a long series that have since been determined. *Irvine v. Houston*, 4 Pat. H. L. Cas. 521, a Scotch appeal to the House of Lords, decided six years later, is to substantially the same effect, Lord ELDON saying that a course of decision such as the life-tenant contended for "would have led to inconveniences which would have been intolerable." The law on this point had now become settled. Judges, admitting the total lack of principle on which the cases of *Branden v. Branden* and *Irvine v. Houston* rested, felt bound to follow them on the ground of *stare decisis*: *Clayton v. Gresham*, 10 Ves. 288. An attempt to distinguish between cash bonuses and stock bonuses failed, Lord ELDON pronouncing the distinction between them as "too thin:" *Paris v.*

Paris, 10 Ves. 185. Nor did it make any difference what the intention of the corporation might be as to the disposition of the bonus. "Whatever conduct or language the bank may hold," said Lord ERSKINE, "if they do not increase the dividend, but take this mode of distributing the profit, it is a part of the capital:" *Witts v. Steere*, 13 Ves. 363. See, also, *Warde v. Combe*, 7 Sim. 634, and *In re Armstrong's Trust*, 3 K. & J. 486. But the evident injustice of this line of decision to the life-tenant made judges solicitous, whenever they could manage to do so, to secure to him his rights: *Cuming v. Boswell*, 2 Jur. (N. S.) 1005. Whenever, therefore, it appeared that the profits out of which a bonus was declared were all made during the life-tenancy, or subsequent to the investment in the particular stock, that bonus was adjudged income, and awarded to the life-tenant: *Murray v. Glasse*, 17 Jur. 816; *Plumbe v. Neild*, 29 L. J. Ch. 618. And so far did the courts go that in some cases, in the absence of all direct evidence as to when the profits out of which the bonus was declared were made, they presumed them to have been earned during the life-tenancy: *Murray v. Glasse*, *supra*; *Ashhurst et al. v. Field's Admr.*, 11 C. E. Green 1. In determining when profits had accrued some nice questions were raised. But the actual time of payment of a debt to a corporation, as distinguished from the period when it was incurred or became payable, was fixed upon as that in which the profit was deemed to have been made: *MacLaren v. Stanton*, 3 De G., F. & J. 202.

The line of decision which has just been detailed has, however, been entirely overruled by more modern cases in the courts of England, Massachusetts, New Hampshire, New York, New Jersey and Pennsylvania. Those of England and Massachusetts, and according to the principal case, those of Georgia have adopted one principle. Those of New

York, New Jersey and Pennsylvania, and possibly those of New Hampshire, have adopted another. They will be considered separately.

(a.) *The Modern Cases in England and Massachusetts.*—The older English cases, as has been seen, completely disregarded the intent of a corporation in declaring a bonus or stock dividend, as to whether it should be capital or income: *Witts v. Steere*, 13 Ves. 363. Yet this, in the modern cases, both in that country and Massachusetts, has come to be considered as the turning point in every controversy. The net earnings of a corporation remain, it is said, the property of the company as fully as any other property, until the directors see fit to distribute them to the stockholders. It is quite competent for the directors to make, in the mean time, whatever disposition of those earnings they may please. They may buy property for the corporation, make improvements to that already owned, invest on real or personal security, or simply allow the fund to remain idle. No individual stockholder has any right to control their discretion in the matter, nor has he power to force them to make distribution of the fund. Hence, it is said, as the corporation is the owner of these earnings, to all intents and purposes, and may distribute them or not just as it pleases, that when distribution is made, such distribution is in the nature of a gift by the corporation to its various stockholders, and that such gift may be made in whatever shape and upon whatever terms the corporation pleases. If, therefore, the corporation chooses to distribute the accumulated earnings with the intention that the gift shall be a gift of income, it is to be appropriated as income; but if with the intention that the gift shall be a gift of capital, then it is to be appropriated as capital, and this without any reference to the time when the profits out of which the gift is made were earned.

The practical application of this principle in several decided cases has furnished the means of laying down the following rule for ascertaining in every given case what the intention of the corporation is. Where the bonus declared is in the shape of cash, then the intent of the corporation will be presumed to be to distribute it as income, unless a contrary intent may be inferred, either from the terms of the resolution declaring the bonus, or from the attendant circumstances: *Dale v. Hayes*, 40 L. J. Ch. 244; *In re Hopkins's Trusts*, L. R., 18 Eq. 696; *Leland v. Hayden*, 102 Mass. 542. But where the bonus declared is in the shape of stock, then the intent of the corporation will be presumed to be to distribute it as capital, unless a like contrary intent may be inferred: *In re Barton's Trusts*, L. R., 5 Eq. 238; *Minot v. Faine et al.*, 99 Mass. 101. But in every case the court will look at the substance of the transaction and not at its form merely. Where, therefore, a corporation bought with its surplus profits some of its own stock which it subsequently apportioned among its stockholders, it was held that in substance, as well as intent, a cash bonus had been declared which was to be considered as income: *Leland v. Hayden*, *supra*; and where a corporation declared a cash bonus, and at the same time authorized the issue of new shares to an amount equal to the bonus, and the bonus was actually intended to be and was applied to payment for the new shares, it was held that this was substantially the declaration of a stock dividend, and that the new shares were to be considered capital: *Daland v. Williams*, 101 Mass. 571; *Heard v. Elredge*, 109 Mass. 258. No definite rule can of course be laid down as to what terms in the resolution declaring the bonus or dividend, or what attending circumstances will be sufficient to rebut the ordinary presumption that cash shall be considered income, and

stock capital. Each case depends upon its particular facts. In *Gifford v. Thompson*, 115 Mass. 478, where a corporation had sold its franchises and property preparatory to dissolving its corporate existence, and afterwards made distribution of all its cash assets among its stockholders, including a large amount of profits which had accumulated during the existence of a life-tenancy in a portion of its stock, it was held that it was the clear intent of the corporation not to make a division of earnings, profits or income, as such, but to apportion and distribute all its property as capital. On the other hand it was held in *Lord v. Brooks*, 52 N. H. 72, that where, under similar circumstances, a distribution of the accumulated profits alone was made, the clear intent of the corporation was to divide them as income.

(b.) *The Cases in Pennsylvania, New York and New Jersey.*—These cases proceed substantially upon the principle contended for by the life-tenant in the early English authorities. Conceding that the accumulated profits of a corporation remain its absolute property until divided, they nevertheless hold, when once they are divided, either in the shape of a cash bonus or a stock dividend, that the question whether that bonus or dividend shall be deemed capital or income, depends wholly upon the time when the profits, out of which it is declared, were earned. If they were earned prior to the inception of the life-tenancy in the stock, then the bonus or dividend is to be deemed capital. If, on the contrary, they were earned during the life-tenancy or subsequent to the investment in the stock, then the bonus or dividend is to be deemed income which properly belongs to the life-tenant. If they were partly earned during one period, and partly during the other, the bonus or dividend must be divided between capital and income proportionably: *Lord v. Brooks, supra*; *Simpson v. Moore*, 30 Barb. 637;

Earp's Appeal, 4 Casey 368; *Van Doran v. Olden*, 4 C. E. Green 176. See also *Woodruff's Estate*, 1 Tuck. 59. The reasons upon which this principle rests are set out at length by Lewis, C. J., in *Earp's Appeal, supra*. "Where the profits of a corporation," said he, "have been accumulating for many years, * * * and the owner dies, directing the 'income' of his estate to be applied to particular objects for limited periods, these extraordinary accumulations are as much a part of his capital as any other part of his estate, and must, therefore, be regarded as forming a part of the principal from which the future income is to arise. * * * The profits arising since the death of the testator," he says, however, "are income. That sum is the rightful property of the appellants (life tenants). The managers might withhold the distribution of it for a time for reasons beneficial to the interests of the parties entitled. But they could not by any form of procedure whatever deprive the owners of it. The omission to distribute it semi-annually, as it accumulated, makes no change in its ownership." The doctrine laid down in these cases is very far from being a satisfactory one. If accumulated profits are, as admitted, wholly the property of the corporation until divided; if they may be expended, invested, accumulated, retained or distributed precisely as, and precisely when, the corporation pleases, how then can it be said that any right or title to them accrues to any particular stockholder at the period they are earned, as contradistinguished from the period when they are divided? And what is there, therefore, of solid ground for the principle on which the cases proceed?

It may be curious too, to observe, hereafter, whether the courts will follow this principle to its logical conclusion. Suppose a bonus declared after the death of the life-tenant, out of profits which were partly earned during his

tenancy, will the executor of the life-tenant be held entitled to recover from the remainderman a proportional part of such bonus? Proceeding upon strict principle, he should clearly be held to be so entitled.

The practical methods adopted by the courts to effect the necessary apportionment of the bonus in those cases where the profits out of which it is declared have accrued partly prior, and partly subsequent, to the inception of the life-tenancy have somewhat varied.

In New Jersey the plan pursued is very simple. The per cent. of accumulated profits to each share at the time of the inception of the life-tenancy in the stock is ascertained. The per cent. of accumulated profits to each share at the time of instituting the litigation is then computed. If the latter sum be equal to or greater than the former, the whole of the bonus is awarded to the life-tenant. If it be less, sufficient is deducted from the bonus to make up the difference, and this is reinvested as capital. The balance, if any there be, goes to the life-tenant: *Van Doran v. Olden, supra*.

In Pennsylvania a somewhat different method is adopted. The value of each share at the inception of the life-tenancy in the stock is first ascertained. The value of each share immediately after the issuing of the bonus or stock dividend is then determined. If the value be less at the latter time, than at the former, enough is deducted from the bonus to make up the difference, and this is deemed capital. The rest is accounted income: *Earp's Appeal, supra*. No difficulty has been hitherto experienced in determining what is the real value of a share of stock at the respective periods above mentioned. It has so happened that its market price above par has been invariably precisely equal to the accumulated profits on hand, divided by the number of existing shares. The necessary computation has been, therefore, comparatively simple.

It is, however, clear, that such will not always be the case. The value of a share of stock above par does not depend alone upon the accumulated profits on hand. It depends also, frequently to a great degree, on the business done by the corporation, and on the general confidence felt by the community in its management. These elements must often make a share of stock worth far more above par than its per cent. of the accumulated profits.

When such a state of facts arises it is impossible to say what course will be pursued. It may be that the term "value" employed in the cases will be explained to mean only what it has practically meant hitherto, viz., the capital plus the accumulated profits divided by the number of shares. Probably, however, this will not be the case. A late authority upon an analogous question hereinafter cited (*Biddle's Appeal*, 11 W. N. C. 244), seems to point to the fact that the actual value at the inception of the tenancy in the stock, whether produced by the existence of accumulated profits, by the profitable business of the corporation or by any other cause, will be deemed to constitute the criterion as to what is capital which must be maintained intact. If this be so the value of the stock as affected by like causes immediately after the declaration of the bonus or dividend will also have to be taken into account. How this value is to be determined, it is impossible to say. The market value clearly furnishes no standard. "That would make the rights of the parties depend upon the condition of the stock market, which is as variable as the tides without their regularity:" *Moss's Appeal*, 2 Norris 264-271. Further decision is needed upon this point.

III. *Proceeds of Corporate Property or Franchises*.—Where the proceeds of a sale of corporate property constitute the fund out of which a dividend, either ordinary or extraordinary, is declared

to the stockholders, the question as to whether that dividend shall be deemed capital or income is sometimes complicated by considerations other than those already mentioned. If the property in question has originally been purchased with profits, the dividends declared from the proceeds of the sale will of course be distributed just as dividends declared from those profits would have been. If, on the contrary, the property has been bought with the capital of the corporation, or has actually formed a part of that capital, a very different rule applies. Capital remains capital, no matter through how many transmutations it may pass. Hence property bought with capital is capital, the proceeds of that property are likewise capital, and dividends declared out of those proceeds must be deemed and accounted as capital: *Heard v. Elredge*, 109 Mass. 258; *Wheeler v. Perry*, 18 N. H. 307; *Vinton's Appeal*, *supra*. Nor can it make any difference what the intent of the corporation is in declaring the dividend, for though some authorities hold, as has been seen, that that intention may be effectual to transmute income into capital, no case can be found where it has been deemed effectual to transmute capital into income.

The principle just laid down was clearly recognised by Lord ELDON in *Barclay v. Wainwright*, 14 Ves. 66, and has been enunciated in several American cases. It applies where the fund from which the dividend is declared has been produced by a sale of part of the franchises of the corporation (*Vinton's Appeal*, *supra*), or where it consists of a reserve which the corporation has been obliged by law to keep, and which constitutes "part and parcel of the capital stock and no part of the profits or income:" *Winslow v. Haven*, cited 52 N. H. 76. It was invoked too in *Clarkson v. Clarkson*, 18 Barb. 646, under the following circumstances: Two railway corporations consoli-

dated, called in the stock of the old companies and issued to the various stockholders new shares in the consolidated company, equal in number to the old shares but of a diminished par value. The difference in value between the old shares and the new was made good by issuing the bonds of the consolidated company for that amount. These bonds it was held, represented part of the original capital of the investment, and must be deemed capital.

A similar conclusion was reached in *Vinton's Appeal*, *supra*, though it seems to have escaped the attention of the court that a portion of the property, the proceeds of which were in dispute, had been bought with the earnings of the company, and not with its capital. In the court below this circumstance was dismissed with the remark that "when profits are used to extend enterprises of this kind they become capital," but the soundness of this doctrine, in view of the cases already cited, may be doubted. On principle it would seem that the portion of the fund representing earnings should be distributed as a bonus declared out of earnings would have been. The principle above laid down is not, however, without an exception. It sometimes happens that a company is incorporated for the express purpose of buying property with its capital, improving it and subsequently selling it at an advance. In such cases the proceeds of sales of property, which have constituted part of the capital of the company are frequently on hand, and dividends from such funds "are the ordinary ones and the principal ones which the company may be expected to make:" *Reed v. Head*, 6 Allen 174. Such dividends have therefore generally been considered income: *Balch v. Hallet*, 10 Gray 402.

The sum received by an insurance company from a foreign government under a treaty as compensation for losses occasioned by that government

and sustained by the company, is to be considered as income, and dividends declared out of such fund will be distributed accordingly: *Harvard College v. Amory*, 9 Pick. 446. The same doctrine applies where the fund in question has been produced by the sale of patent rights and patterns, the property of a manufacturing corporation: *Harvard College v. Amory*, *supra*.

IV. Options to subscribe to New Stock.

—When a corporation offers to its shareholders the option of subscribing to new stock, such stock often becomes at once in the hands of the subscribers, either by reason of the existence of a surplus fund, by reason of the business prospects of the corporation, or for some other cause, worth far more than the amount expended for its purchase. For the same reason the option to subscribe, if sold in the market, will often realize a considerable sum. Where such an option is offered during the existence of a life-tenancy, the value of the new stock above what is paid for it, or, what is the same thing, the proceeds of the sale of the option to subscribe to such stock, has sometimes formed the subject of litigation between life-tenants and remaindermen. In Massachusetts, such sums are held to be properly capital. "The right or privilege to take new shares in a corporation," said BIGELOW, C. J., "is a benefit or interest which attaches to stock, not as profit or income derived from the prosecution of the corporate business, but as inherent in the shares from their very creation. * * * It is an original incident or attribute pertaining to each share—a right to a larger participation or ownership in the capacity of the corporation to earn profits, and not the gain or income itself actually earned by the corporation. In this view the value of the right must be regarded as capital:" *Atkins v. Albree*, 12 Allen 359.

In Pennsylvania—the only other state in which the question has arisen—the

cases have been such as to render it impossible to lay down any broad principle as a guide for future litigation. In *Wiltbank's Appeal*, 14 P. F. Smith 256, it was held that "the price brought by the sale of the subscription right, and the premium of the subscribed stock, were an incidental, and, in one sense, an accidental, profit, following the ownership of the old stock, as the product of an advantage belonging to it," and it was therefore accounted income.

This case, however, is of little or no value as a precedent, because it entirely omits mention of a circumstance which, owing to the subsequent line of decision, must inevitably enter as an element into every future litigation upon the point. That circumstance is the cause of the value of the option. That cause may be, as has been already said, either the existence of accumulated profits, a confidence in the prosperity and management of the corporation, or both of these circumstances combined. The former circumstance alone was considered in *Moss's Appeal*, 2 Norris 264. Here, at the time the option was offered there was on hand a large amount of accumulated profits. It did not appear when those profits were earned. The market value of each share of stock above par immediately before that period happened to be precisely equal to its per cent. of the accumulations then on hand. Every stockholder being given the right to purchase as many of the new shares at par as he had of the old, the effect was to double the number of shares the value of which was enhanced by the accumulated fund. Hence, each old share was diminished in value above par by half; while each new share immediately on its creation assumed a value above what was paid for it of the same amount. This latter value corresponded of course to the value of the option to subscribe to that share when put upon the market. It was held that, under the circumstances, the proper course was to con-

sider the proceeds of these options as capital, as in this way the *corpus* of the estate would be retained intact at precisely the value it had had immediately prior to the offering of the option.

Both circumstances which give rise to the value of options were considered in the recent case of *Biddle's Appeal*, *supra*. Here there was a fund of accumulated profits on hand, all of which had been earned prior to the inception of the life-tenancy in the stock. The new shares were offered at par, each subscriber to pay, in addition, a sum equal to the par value, which sum was to be added to the surplus of the company. The sum realized from the sale of the option to subscribe to each new share was greater than the decreased percentage of accumulations to that proportion of old shares in right of which such new share was issued. It was contended on behalf of the life-tenant that out of that sum sufficient should be capitalized to make up the decreased percentage of the accumulations to the old shares to what it had been at the time of the inception of the life-tenancy in the stock, and that the rest should be distributed as income. But the court held otherwise. The value of the options, they said, was based upon the right of the new shares to an equal participation in whatever extra value the old stock might have attained either by reason of the accumulations, the business prospects of the corporation or otherwise. In other words, the value of those options was simply a part of the entire value above par attained by the old shares. The ownership of the proceeds of the options was therefore to be determined solely by the ownership of the value of the old shares above par. If this was capital, the proceeds of the options was capital. If it was income, the proceeds of the options was income.

Here that portion of the value of the old shares above par, derived from accumulations alone, clearly arose prior to

the inception of the life-tenancy in the stock, the accumulations having all been earned before that period. An extra value was also presumed to have arisen from other causes before that time, no change in the actual value of the stock having been shown to have occurred during the life-tenancy. The entire value of the old stock above par was therefore said to have accrued prior to the inception of the life-tenancy in the stock. But this, on the theory of *Earp's Appeal*, *supra*, constituted that value capital. The proceeds of the options were therefore properly to be considered capital, and were so decreed.

The decision in this case is by no means satisfactory. The principle upon which it depends is substantially that of *Earp's Appeal*, already cited, and the doubts as to the soundness of that principle before expressed might here be reiterated. It would seem, too, that certain very important considerations were entirely overlooked by the court. The proceeds of the options; or, in other words, the value of the new stock above what was paid for it, did not depend wholly upon the antecedent value of the old stock above par. A portion of that value resulted from the right of the new stock to share ratably with the old in the addition to the surplus produced by the payment by each subscriber thereto of the extra sum equal to the par value. But of this fact the court took no notice.

Other difficulties might be suggested. The very fact of increasing the capital may in itself have communicated an enhanced value to the new stock in common with the old, and so have raised the price of the option. Or perhaps that price was enormously enhanced by some temporary and wholly artificial "boom" in the market. The increase of value brought about by such causes would seem to be clearly in the nature of profit accruing during the life-tenancy, and should have been considered income.

No opportunity was, however, afforded to determine whether any, and, if any, how much, of the value of the option was attributable to such causes. The whole of that value was deemed to arise out of the former value of the old shares, and was distributed accordingly.

The only rule that can safely be deduced from *Biddle's Appeal* as obtaining in Pennsylvania is as follows: Wherever an option to subscribe to new stock is offered, and the value attained by the old stock above par is shown to have remained unaltered from the time of the inception of the life-tenancy in the stock down to the offering of the option, then the value of the new stock above what is paid for it, or the proceeds of the option to subscribe to it, will be deemed capital. But if, on the other hand, the total value of the old stock above par can be shown to have been caused by the accumulation of a fund or from other circumstances arising since the inception of the life-tenancy in the stock, then the value of the new stock above what is

paid for it, or the proceeds of the option to subscribe to it, will be deemed income.

Where the value of the old stock above par has been caused by reason of accumulations or other circumstances happening partly prior and partly subsequent to the inception of the life-tenancy in the stock, the value of the new stock above what is paid for it, or the proceeds of the option to subscribe to it, would seem, on principle, to be properly distributable to capital and to income proportionately. How the necessary computation will be made remains yet to be decided. In *Moss's Appeal* the question was evaded, because the exact period when the accumulations were earned was not shown, and the total proceeds of the options were accordingly awarded arbitrarily to capital. But the day is not far distant when the question will have to be faced. The test of market values has been most properly repudiated. What test will be adopted?

LAWRENCE LEWIS, JR.

United States Circuit Court. Eastern District of Pennsylvania.

NORRINGTON v. WRIGHT.

Under a contract for 5000 tons of rails to be shipped in about equal quantities in February and four succeeding months, the whole to be delivered by August 1st, the purchaser may rescind on failure to ship the stipulated quantity in February.

A severable contract may be severed for the purpose of enforcing rights as they accrue, but a party in default cannot insist on its being treated as severed to avoid a right to rescind for non-performance of any one portion.

Partial performance, accepted and retained in ignorance of any default of the seller as to the residue, does not prevent the right of rescission for such residue when the contract furnishes an exact measure of compensation for the partial performance.

MOTION to take off nonsuit. The action was assumpsit on the following contract:

“Philadelphia, January 19th 1880.

Sold to Messrs. Peter Wright & Sons, for account of Messrs. A. Norrington & Co., London, 5000 tons old T iron rails, for ship-

ment from a European port or ports at the rate of about 1000 tons per month, beginning February 1880, but whole contract to be shipped before August 1st 1880, at \$45 per ton of twenty-two hundred and forty pounds custom-house weight, ex ship Philadelphia. Settlement cash, on presentation of bills accompanied by custom-house certificates of weight. Sellers to notify buyers of shipments, with vessels named, as soon as known by them. Sellers not to be compelled to *replace* any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia."

Three counts set out the contract and averred performance in its terms, *i. e.*, a shipment of about 1000 tons in January, February, &c., with averment of arrival, tender, and refusal to accept. The fourth count it was admitted was not proved.

On the trial, the plaintiffs proved shipments were made in February, 395 tons; March, 897 tons; April, 1349 tons; May, 1099 tons; June, 991 tons; July, 306 tons.

The 395 tons shipment arrived, was delivered, and paid for. In May, before the arrival of the other cargoes, the defendants, having ascertained the amounts that had been shipped in February and March, thereupon gave notice of rescission, and declined to accept any shipments as they arrived and were tendered.

It appeared that defendants at the time of receiving the first cargo did not know of plaintiffs default in making the shipments.

At the close of the plaintiffs' case, the court, MCKENNAN and BUTLER, JJ., being of opinion that defendants had the right to rescind the contract, plaintiffs elected to suffer a nonsuit, with leave to move to take it off. The present motion was then made.

Samuel Dickson and J. C. Bullitt, for the motion.

R. C. McMurtrie, contra

The Judges delivered oral opinions as follows:

BUTLER, J.—To justify an allowance of the motion we must be convinced that our ruling at the trial was wrong. We are not so convinced. The motion must, therefore, be dismissed.

For myself, however, I may say that I regard the point as involved in serious doubt; not so much when considered on general principles, as when viewed in the light of modern decisions. The right to rescind a contract for non-performance is a remedy as old

as the law of contract itself. Where the contract is entire—indivisible—the right is unquestioned. The undertakings on the one side, and on the other, are dependent, and performance by one party cannot be enforced by the other without performance, or a tender of performance, on his own part. In the case before us the contract is “severable.” But to say it is “severable,” does not advance the plaintiffs’ argument. A “severable” contract, as the language imports, is a contract *liable* simply to be severed. In its origin, and till severed, it is entire—a single bargain, or transaction. The doctrine of severableness (if I may be allowed to coin a word), in contracts is an invention of the courts, in the interests of justice, designed to enable one who has partially performed, and is entitled on such partial performance to something from the other side, to sustain an action, in advance of complete performance—as where goods are sold to be delivered and paid for in parcels, to enable the seller to recover for the parcels delivered, in advance of completing his undertaking. But this equitable doctrine should not be invoked by one who had failed to perform, for the purpose of defeating the other’s right to rescind, and thus to protect himself against the consequences of his own wrong. As against such a party the contract should be treated, and enforced, as entire. To say, therefore, that the contract is “severable,” does not, I repeat, advance the argument. To render the plaintiff’s position logical, it is necessary to take a step forward, and hold that such a transaction (it would not be accurate in this view to call it a contract), constitutes several distinct, independent contracts. Then, of course, it follows that a failure, as respects one of several successive deliveries, affords no right to rescind in regard to those yet to be made. And this step, after much apparent doubt and hesitation, the English courts have taken. It was the necessary outgrowth of the decision in *Simpson v. Crippen*, which overruled *Hoare v. Rennie*. In our own country the cases are inharmonious, and the question unsettled. After a careful examination of what has been said on the subject, I shall not be surprised if the courts here finally adopt the present English rule, and thus substitute compensation in damages for the remedy by rescission to the extent there done. I say this, however, not because I think it wise to adopt this rule, but because of an apparent leaning in that direction.

The question, however, as here presented, is properly for the

Supreme Court, to which I hope it may be carried, and the rule thus be settled.

McKENNAN, J.—I concur even more decidedly. I am not satisfied that the weight of the opinions, even in England, is with these decisions. So far as this country is concerned it cannot be said there is any such rule. I have such doubt of the justice of the rule that I am not willing to take this step forward. It is more respectful to remit this to the Supreme Court, and, therefore, I do not feel disposed to take the advanced step.

Motion dismissed.

As will be seen by the opinions in the principal case, great doubt was experienced by the court as to the correctness of the decision arrived at. This doubt was the natural result of the conflict of authority upon the point, a conflict, however, generally more apparent than real. The question is one of great interest, and its proper determination is of the highest importance to the commercial and mercantile world. In delivering the opinion of the court in *Ligget v. Smith*, 3 Watts 332, the late Chief Justice GIBSON began by saying: "Previous to the decision of *Boone v. Eyre*, 1 H. Bl. 273 (note a), it seems to have been taken that nothing less than entire performance of a mutual covenant would entitle a party to his action for a breach on the other side. In that case, however, a more reasonable and just rule was adopted, by which a mutual or dependent covenant which goes but to a part of the consideration on both sides, and whose breach may be compensated in damages, is to be treated exactly as if it were separate and independent. This is distinctly the principle, and has been established by a train of decisions both in England and this country which it is unnecessary to quote." The case of *Boone v. Eyre*, *supra*, was this: Plaintiff conveyed to defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l.*, and an annuity of 160*l.* for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that, the plaintiff well and truly performing all and everything therein contained on his part to be performed, the defendant would pay the annuity. The action was covenant, the breach assigned being the non-payment of the annuity. Plea, that the plaintiff had no good title to the negroes to convey. Demurrer to the plea, and judgment thereon for the plaintiff, upon the principle recited in *Ligget v. Smith*, *supra*; Lord MANSFIELD pithily remarking, that to hold otherwise would make the failure of the plaintiff's property in one negro a bar to the action. So that it results from this, that recovery can be had, even on contracts in consideration of performance, when the part broken on one side does not go to the entire consideration. But where covenants are mutually dependent, the one upon the other, there must be performance by one party before suit can be maintained for a breach by the other. *Pordage v. Cole*, 1 Wms. Saunders (Sir E. V. Williams's ed.) 548, is a strong example of the same tendency, that is, to hold either party bound to a performance of his part of the contract unless he can show the absolute interdependence of the two covenants or contracts. So,

in *Fothergill v. Walton*, 8 Taunt. 576, where the contract was a charter party between ship owners and freighters, and the ship owner covenanted to take on board six pipes of brandy at Havre, and therewith proceed to Terceira, and there take on board a cargo of fruit or other goods, as the freighters might think fit, and proceed to London or Bristol as might be ordered by the freighters, and there make a true and right delivery of the fruit, and the freighters covenanted to pay freight for the fruit and brandy, the freight of the brandy, &c., to be taken out in fruit at Terceira, and guaranteed the ship a full cargo home, it was held that the agreement to take brandy to Terceira was not a condition precedent, but a distinct and independent covenant. And, the action being against the freighters for not putting on a full cargo at Terceira, the owners having averred generally performance, a demurrer to the declaration was overruled. This case is an instructive example, and the arguments of counsel show clearly what was at that time the understanding of the profession upon the point. In support of the demurrer, LENS, Serjt., argued, that an averment of general performance was not enough; that the defendants would have been able to barter the brandy for the return cargo of fruit, but that they were unable to get the full cargo because of the plaintiff's failure. He was asked by DALLAS, C. J., the awkward question, whether, if the plaintiff had omitted wilfully to get more than five tierces of brandy when he might have had six, the defendant ("plaintiff" in the text, but evidently a mistake) would have been discharged? It was answered, that then the plaintiff must have averred that no more was to be had. VAUGHAN, Serjt., *contra*, justly pronounces this unsound, and says that if the delivery of the brandy was a condition precedent, the carrying of five instead of six tierces would not suffice, and the plaintiff could not re-

cover. He cites *Storer v. Gordon*, 3 M. & S. 308, a very analogous case. In reply, LENS, Serjt., admitted, that if the homeward voyage did not grow out of the outward voyage, the defendant must fail; and fail he did. The law was clearly expounded in a short opinion by DALLAS, C. J., and the doctrine therein laid down is said to have all the weight which some of the greatest names in Westminster Hall can give it. See also the opinions of LAWRENCE and LE BLANC, JJ., in *Glazebrook v. Woodrow*, 8 T. R. 366, a case very analogous to, and somewhat stronger than, *Fothergill v. Walton* is *Storer v. Gordon*, *supra*. Numerous other cases might be mentioned. The principle enunciated in *Fothergill v. Walton* is familiar to all the early decisions, and was affirmed with a few apparent exceptions, until the case of *Hoare v. Rennie*, 5 H. & N. 19; s. c. 29 L. J. (Ex.) 73, which is a very important case, and deserves careful consideration. The case was this: Defendants bought of plaintiffs 667 tons of Swedish iron, said iron to be shipped from Sweden in the months of June, July, August and September, in about equal portions each month, at a fixed price per ton delivered in London. Plaintiff shipped only 21 tons in June, which arrived in July. Defendants refused to accept the iron, and gave notice of rescission, and the plaintiff then brought suit upon the contract. It was held by the whole court that the defendants had the right to rescind. No authority is cited by any of the learned barons in support of their opinions, and only one or two cases mentioned, and the greatest light thrown upon the decision, is from a remark of POLLOCK, B. (L. J., 29 Ex. 77): "The question is one of law for the court under all the circumstances of the case, but where parties have made an agreement the court ought not to make another agreement for them merely because of laxity in the terms of the agreement."

In *Hoare v. Rennie*
 the shipment was
 to be more than
 150 Tons. & as he
 had to ship more
 667 T. in 4 wks.
 there must have
 been a shipment
 at least in some
 one month. The
 shipment therefrom
 is not current like
 objects to or
 account of its size

Certainly it was a case in which the plaintiff was entitled to but little consideration; his first shipment had been grossly incomplete and had arrived late, and he had made no offer or tender of the subsequent monthly shipments. It must also be remembered that the action was for a refusal to accept the incomplete first shipment, and it might very reasonably be urged that while an incomplete shipment in June would not excuse the defendants from accepting a proper shipment in July, yet they could not be compelled to accept a portion of any one entire shipment. Moreover, as noticed in *Freeth v. Burr*, *infra*, a shipment of so small a portion might have been considered a complete breach by anticipation. *Hoare v. Rennie*, *supra*, however, even with its peculiar circumstances, did not find favor with the courts in subsequent cases. In *Jonassohn v. Young*, 32 L. J. Q. B. 385, CROMPTON, J., says, in differently deciding an analogous case, that in *Hoare v. Rennie*, the court must have considered time as of the essence of the contract. And this is indicated by the remark of POLLOCK, C. B., quoted *supra*. In *Simpson v. Crippin*, L. R., 8 Q. B. 14, where the facts were very similar to those in *Hoare v. Rennie*, that case was practically overruled, the judges, BLACKBURN, MELLOR and LUSH, declaring themselves unable to understand it; LUSH, J., saying, as above, that time must have been considered of the essence of the contract. And in *Freeth v. Burr*, L. R., 9 C. P. 208, the court says that *Hoare v. Rennie*, is to be supported on the ground that there was a prospective abandonment of the contract by the plaintiffs. The action of the court in *Freeth v. Burr*, shows how well satisfied its members were of the general rule. The question came before them thus: At the trial, before BRETT, J., he directed a verdict for the plaintiff, subject to the defendant's right to move for a nonsuit, if the court were of opinion

that the plaintiff's conduct amounted to an abandonment of the contract. According to the English practice, the defendant then took a rule nisi. The facts were, that a quantity of iron was to be delivered in two shipments, the first in two weeks, the second in four weeks, to be paid for two weeks after each delivery. The first delivery was not completed for six months. Plaintiffs, the vendees, refused to pay, claiming to set off the damages for delay, but demanded the second delivery. This being refused, suit was brought. Counsel appearing against the rule were stopped by the court, although *Hoare v. Rennie* was cited and argued from at length by the other side. Lord COLERIDGE's opinion, concurred in by Justices KEATING and DENMAN, is certainly entitled to very great weight. In *Roper v. Johnson*, L. R., 8 C. P. 167, 172, *Simpson v. Crippin* is considered as settling the law. Even the cases which recognise *Hoare v. Rennie*, of which *Bradford v. Williams*, L. R., 7 Ex. 259, is one, do so upon the special circumstances of the case, recognising the true rule, namely, that in every case the intention of the parties as gathered from the contract must govern. It would be useless to multiply authorities in England. The great weight of authority there is clearly against the rule adopted in the principal case. A very recent case, however, *Houck v. Muller*, L. R., 7 Q. B. Div. 92, is undoubtedly an authority the other way; this decision is so important and extraordinary, that it deserves careful consideration. The defendant, in October 1879, sold to the plaintiff 2000 tons of pig iron, to be delivered in November 1879, or, "equally in November, December and January next," at 6d. per ton. Plaintiff failed to take any iron in November, but claimed the December and January deliveries. The defendants declined to make the two last deliveries, and gave notice that they

considered the contract cancelled by the plaintiff's failure to take the November delivery. It was held, reversing the court below, that the defendant's refusal was justifiable. From this judgment, BRETT, L. J., dissents. The contract, as stated by BAGALLEY, L. J., is susceptible of three constructions: 1. That relied on by the plaintiffs, that, unless he elected to take all in November, the contract was for equal portions in three months. 2. That relied on by the defendant, that the plaintiff was bound to make his election in November, and communicate it to the defendant, in order that the defendant might be able to deliver the whole or one-third, as the case might be, in that month. 3. An alternative suggestion by the defendant, that the plaintiff was to take the whole 2000 tons in November, unless he gave notice to the defendant that he elected to have the cargo delivered in three equal portions. BRAMWELL and BAGALLEY, L. JJ., concur in holding the second view of the contract to be the true one, and that in that or the third view the plaintiff had no case. But for the sake of argument, they take the plaintiff's construction, and even then, following *Hoare v. Rennie*, their judgment is the same; Lord BRAMWELL admits, however, as the authorities compel him, that if the second delivery and not the first, had been refused, there would have been no right to rescind. He goes on to say somewhat mournfully, "Suppose the November delivery would have been a profit to the defendant, and the December and January deliveries a loss, why is he to bear the loss and have no security that he will get the profit? This reasoning would, no doubt, apply where there is part performance, but then there is no help for it. It is asked whether every trifling breach of contract is attended with this consequence. I know not. But 666 tons out of 2000 are not a trifle." He concludes with the remark, that in such a case the buyer

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does not buy any parcel of 666 tons, any more than where a suit of clothes is sold there is a separate sale of coat, waistcoat and trousers. The vigorous and logical dissent of BRETT, L. J., will repay careful perusal. And the whole case, carefully read, will be seen to be against the principal case, the concluding remark of Lord Justice BRAMWELL, just quoted, evidencing the entirely erroneous view held by him. Surely it requires no argument to show the difference between the purchase of trousers, coat and vest, together forming a *suit*, and the purchase of iron, as in the principal case, or even in *Houck v. Muller*, where, the plaintiff's position was weaker. *Hoare v. Rennie*, the reliance of the court, has been said to have the "weight of authority largely opposed to it" in the notes to *Cutter v. Powell* (RUSSELL, Q. C., arg., L. R., 7 Q. B. D. 97). See, also, 15 Am. L. Rev. 687, for the true ground, we may say the only ground, on which *Houck v. Muller* can be sustained, namely, that of prospective refusal, or complete breach by anticipation.

Coming now to this side of the Atlantic, we find it stated by Mr. Parsons (2 Contracts *517) that, "If the part to be performed by one party consists of several distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held severable; * * * but if the consideration to be paid is single and entire, the contract will be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." This statement has been judicially approved in several cases, and it is conceived to be a very correct presentation of the law.

The rule plainly deducible from the Pennsylvania cases is, that a partial failure to perform any part of a contract will not deprive a party of the

right to recover for work already done under it, or for the refusal of the other party to continue it, unless the breach is one which goes to the entire consideration, and it is evident that the contract would not have been entered into except in view of complete performance. It is not the multiplicity of items in a contract which determines its severable or non-severable character; but it is its *object*. It has been held very frequently and with great reason, that the effect of a breach of a severable contract may be set off by the defendant in suits like the principal case, and deducted from the damages recovered, as such breach would manifestly give him a right to sue. But this is altogether different from preventing a party to a contract from recovering at all for work already done, or which he has offered to do, under the contract. No one is injured by this rule. The whole intent and purpose of the law in cases of this kind is to do exact justice between the parties; and if the loss occasioned by the partial failure can be recouped by the defendant, there can be no conceivable reason for allowing him to escape performance of his part of the contract. The case of *Obermyer v. Nichols*, 6 Binn. 159, is an early illustration of the point in Pennsylvania. In that case there was a lease of a mill, with a covenant on the part of the lessor to put up improvements. The improvements were not put up, but the rent of the mill was recovered nevertheless—the failure did not go to the whole consideration. The defendant was allowed to set off his loss by the non-erection of the improvements. The dislike to the idea of the exoneration of one party by the partial failure of the other, is strongly instanced in *Ligget v. Smith*, 3 Watts 331, where the plaintiff had agreed to build a warehouse and use certain mortar in its construction. Mortar was not used according to the contract, but it was held that this did

not constitute an entire defence to an action on the contract, but that the defendant might set off whatever damage he had sustained. Of the later cases, *Shinn v. Bodine*, 10 P. F. Smith 182, is instructive. The contract was: "We accept your offer for 800 tons coal at \$6.12½, per ton of 2240 pounds. Coal to be delivered as sent for during the months of August and September. Should we be unable to get all away by close of September, it is understood you can keep on wharf or bring down later, as you prefer, as much as 300 tons." One cargo was delivered under this contract, and payment therefor demanded and refused. The defendants then declined delivering any more coal, and the plaintiff then brought suit on the contract. The defendants requested the court to charge that the plaintiff's default in not paying excused them from further delivery. This was declined, on the ground that the consideration was entire, and there was no severance in it, and, therefore, the plaintiff was really in no default. Unless considered carefully, this case is liable to grave misinterpretation. It would seem to decide that *severable* contracts may be rescinded, and not *entire* contracts, whereas the reverse is certainly more nearly true as a general proposition. It will be observed that *Shinn v. Bodine* was almost the converse of the principal case. Instead of a suit for a refusal to accept part performance of the contract on one side, it was a suit to recover damages for failure to continue performance on the other. The defendants claimed to rescind. Under *Withers v. Reynolds*, 2 B. & Ad. 882, the plaintiff's conduct, had the contract been severable, would have amounted to a complete breach by anticipation, which, as noticed in *Freeth v. Burr*, *supra*, gives the right to rescind even such contracts. But as the contract was entire, there being no evidence of severance in the payments, there was no breach by the

plaintiff and, of course, the defendants were liable. The case is very far from deciding that, had there been a severable contract, and only a *failure* to make one payment, not a *prospective refusal* to pay at all, the defendants would have been excused from further performance. This is shown to be the true meaning of the case by the subsequent rulings of the same court. In *Lucasco Oil Co. v. Brewer*, 16 P. F. Smith 352, Parsons's statement of the law is approvingly cited. A very strong case is *Morgan v. McKee*, 27 P. F. Smith 228. Defendants bought 4000 barrels of oil from the plaintiffs, and eight similar papers of the same date were executed to them, each for the delivery of 500 barrels a month, cash on delivery. Plaintiffs, on demand, refused to deliver the oil on one of the appointed days. The defendant, on the next day for delivery, gave notice of rescission on the ground of the previous default. It was held that the plaintiff might recover for the refusal of the defendant to accept and pay for the oil subsequently tendered at the appointed times. Mr. Justice WILLIAMS, in delivering the opinion of the court, pronounces the contract beyond question severable, and says that the plaintiff's failure to deliver once did not exonerate the defendants from accepting and paying for the future deliveries, and did not, *per se*, end the contract, though it doubtless gave the defendants a right to recoup whatever loss the breach had occasioned them, and continues: "If it gave defendants a right to rescind, they should have exercised it promptly," and decides against them on the ground that at all events they had waited too long. No matter what the contract, if the defendants intend rescinding, they must act promptly. It will be observed that the learned judge does not decide in express terms either for or against the right to rescind; but it is conceived that the implication is against it. Even if a contract is entire, there must be

reasonable diligence in exercising the right of rescission. And if the delay were the sole reason for the decision, the court were at useless pains to show the contract severable. The true meaning of the opinion is, that a partial failure of performance by one party does not, in such cases, release the other party from his obligations. See, also, the remarks of Mr. Justice TRUNKY, in *Scott v. Kittanning Coal Co.*, 8 Norris 232, 238. *Graver v. Scott*, 30 P. F. Smith 88, clearly indicates that, in the absence of proof of the interdependence of the parts of such a contract, it will be considered severable, and, therefore, a breach will not excuse the other party from further performance. See, also, *Stoddart v. Smith*, 5 Binn. 355. *Quigley v. De Haas*, 1 Norris 267, decides that contracts of this nature are *prima facie* severable, but that where it can be shown that such was not the intention of the parties, they will be construed entire.

Cases in other states bear out the same doctrine. We may refer in New York to *Snook v. Fries*, 19 Barb. 313. The agreement was for the manufacture of several thousand bricks during the season of 1853, at so much per thousand, to be paid for as fast as burned. After burning one kiln, plaintiff deliberately abandoned the contract, and sued for what he had done. The defence was, that the contract had been *abandoned*; it was held that this did not end it, but that the defendants might bring a cross suit. So that while the contract subsists, either party may recover upon it for performance, and by necessary implication for an offer to perform, being in turn liable to account in damages for partial or defective performance. So, in *Swift v. Opdyke*, 43 Barb. 274, where the agreement was by parol for twenty-two bales of blankets expected to arrive in two shipments, of eight and fourteen respectively. Seven bales arrived, were delivered, and suit was brought for their

value. The plaintiff recovered. The contract was held to be severable, and it was said that to justify the other construction the inference must be unmistakable—it would impose on the plaintiff a heavy forfeiture. And in *Talmage v. White*, 3 Jones & Spencer 218, we find the following language: "If one order three parcels of goods at a certain price, and one be sent and accepted, he cannot refuse to accept the others, it stamps the contract as *several for each parcel*." This principle, which it is conceived the cases abundantly bear out, is in direct conflict with the principal case. It clearly shows that the contract there was "several for each parcel," for by its very terms it is just such a contract. The various shipments were to be severally accepted and paid for. In *Tipton v. Feitner*, 20 N. Y. 423, Judge DENIO, in delivering the opinion of the court, said: "The position that one who has violated a contract on his part, cannot recover for the breach of any of his stipulations by the other party cannot be sustained." He then distinguishes cases where the consideration is evidently entire in the minds of the parties, and further remarks: "The law no doubt intends to discourage people from breaking their engagements, but this is not generally accomplished by visiting them with a penalty beyond the damages sustained by the party injured." See, also, in New York, *Puttridge v. Gildermeister*, 1 Keyes 93. *Per Lee v. Beebe*, 13 Hun 89; *Sickels v. Puttison*, 14 Wend. 257.

The law in Massachusetts is well illustrated by the two cases of *Newton v. Winchester*, 16 Gray 208, and *Winchester v. Newton*, 2 Allen 492. The same parties were concerned in both cases. The facts were as follows: On 27th May 1857, the plaintiff, in the first case, agreed with the defendant, in writing, to deliver all the oak timber standing on certain wood lots prior to April 1st 1858, at \$6 per cord. Payments, six months after de-

livery. By an endorsement on the agreement, the plaintiff, in February 1858, at the defendant's request, agreed to postpone until April 1st 1859, the delivery of all the timber, "excepting what is now put on cars, being four car loads, and about ten cords at Marlborough depot, which is subject to the depot master's order for delivery," and also "about thirty-five cords cut." The four car loads, &c., were duly delivered, and in October part of the price was paid. None of the rest of the lumber was ever delivered. The suit was brought in February 1859, to recover the balance of the price of the delivered lumber. The defence was, that nothing was due until all was delivered. The court thought otherwise, and gave judgment for the plaintiff, holding that the original, entire contract was severed by the endorsement. In the second case, the position of the parties was reversed. Before the commencement of the former action, Winchester had notified Newton that he would pay no more until the entire contract was fulfilled. After receiving this refusal, Newton delivered no more timber, and the present action was brought to recover for his failure to do so. The judgment was for the plaintiff, the court holding that the contract was severed as before. It was said in the opinion of the court that, "In regard to each portion a distinct liability attached to the parties." The doctrine of *Wuhers v. Reynolds*, was shown to be that of prospective refusal, and it was said, finally, that "The refusal to pay for the timber that had been delivered on October 1st 1858, did not operate to discharge the other party from his promise to deliver timber April 1st 1859." And in the opinion of the court in *Miner v. Bradley*, 22 Pick. 459-60, there is a very clear indication that such a contract is practically made up of several and distinct agreements.

In Maine, the case of *Dwinel v. How-*

ard, 30 Me. 258, cited by the defendant in the principal case, demands special attention. The defendants agreed to deliver to the plaintiff all the ice at certain places at so much per ton. Payment, \$500 on the execution of the contract, to be applied in payment for the last ice received. Balance, one-half in thirty, one-half in sixty days. Or, if any of the ice was taken away sooner, cash on delivery. The "sixty days" payment not having been made, both before and after it fell due the defendants refused to deliver any more unless paid cash for it. Part of the ice remaining undelivered, the plaintiff sued on the contract for damages. The judgment was for the defendant, on two grounds: 1. That they had a right to insist on cash payment, and were not bound to continue delivering when it was refused. 2. That even if they had by their former deliveries waived this right, the plaintiff, to be entitled to exact performance of the residue, should have paid the price within sixty days as agreed. The case is so plainly distinguishable from the principal case that extended comment is unnecessary. In the first place, it is very questionable whether the contract was not entire; and in the second place, by its very terms, payment was to be cash on delivery, or absolute within a certain time; and there was no evidence of willingness on the part of the plaintiff to pay in either way. So in *Haines v. Tucker*, 50 N. H. 309, where the judgment was put upon the express ground that the refusal to accept the malt was unqualified and a clear renunciation of the contract: in the course of its opinion, the court says: "If, on the trial, the jury should find that the refusal of the defendants did not amount to a renunciation of the contract by them, and that what occurred on that day, together with the defendant's previous conduct, was not sufficient to justify the plaintiffs, as reasonable men, in the conclu-

sion that the defendants did not intend to fulfil, and would not do so, then it would be necessary for the plaintiffs to hold themselves in readiness to perform, and a further performance might, perhaps, have been required." In *Tyson v. Doe*, 15 Vt. 571, it is said that, "So long as a contract by its terms remains executory, it may be rescinded, or put an end to, in various ways. This may sometimes be done in virtue of a right expressly reserved to one party alone, or to each of the parties. So the contract may be subject to some express or implied condition, the non-performance of which will annul it, at the election of the party entitled to insist on the condition." See, also, in that state, *Keenan v. Brown*, 21 Vt. 86; *Gallup v. Burnell*, Brayt. 191; *Taylor v. Gallup*, 8 Vt. 340; *Fletcher v. Cole*, 23 Id. 114. So, also, in New Jersey, the question of a vendor's right to rescind was held to depend upon whether a contract is or is not entire: *Thompson v. Conover*, 3 Vroom 466. In North Carolina, there is the case of *Homesley v. Elias*, 75 N. C. 564, where it is said that the plaintiff might have rescinded; but there was a prospective abandonment of the contract by the defendant. In Alabama, the tendency is against the principal case: *Kirkland v. Oates*, 25 Ala. 465; *Drake v. Goree*, 22 Id. 409, 415. And in Mississippi, it is held that a failure of a party to comply with a portion of the stipulations of an agreement, is no ground for a rescission of the whole contract, so as to deprive him of rights secured to him by the other provisions contained in it, and which are wholly independent of those in which he has made default: *Dunlap v. Petrie*, 33 Miss. 590. In Kentucky, the cases of *Trimble v. Green*, 3 Dana 357, and *Hewitt v. Berryman*, 5 Id. 165, serve well to illustrate the law. In the former, a case of condition precedent, where the consideration was a covenant and also a performance, it was sought

to maintain that, the performance not going to the entire consideration, but the covenant forming part of it, the failure to perform might be recouped in damages. But this view was not satisfactory to the court. It was held that the performance was a condition precedent to recovery, and that without it in such cases, there could only be a recovery where the defendant had received some benefit which it would be inequitable to allow him to retain; and *Fordage v. Cole*, or rather the notes to it, the court criticises and disapproves. But in *Hewitt v. Berryman*, there was one contract containing several stipulations, and the following language is used by the court: "Though the contract between Hewitt and Felix is one and entire [this word is not used technically here], it contains several distinct and independent covenants on the part of each, which are not made to depend upon the performance of the whole of the covenants in the entire contract, on either side." It is added, that if suit had been brought for the breach of one stipulation, it surely would not be contended that the plaintiff must aver performance of all his part of the contract. All that is necessary is the performance of what relates to the particular act in question. The Iowa cases are to the same effect: *Dibol v. Minott*, 9 Iowa 403; *McDaniels v. Whitney*, 38 Id. 60. *Robson v. Bohn*, 27 Minn. 333, 346, closely resembles *Dwinel v. Howard*, *supra*, and serves to explain it, as above. Nothing could be more explicit than the language of the court in *Sawyer v. Railroad Co.*, 22 Wis. 403. It is not necessary to recite the facts of that case; they are not in point, although the question under discussion was involved. The court says: "Was such delivery and receipt of payment a waiver of the condition of payment down for the first hundred barrels according to agreement? Did the plaintiff thereby ratify the entire agreement, so that he could not after-

wards rescind as to the one hundred barrels of which Mr. Tilton had thus obtained wrongful possession? * * * I think the plaintiff waived none of his legal rights (arising out of the wrongful delivery or taking of the first one hundred barrels). I think so, because I think the agreement divisible. It was for the sale of 300 barrels of flour at \$8, in lots of 100 barrels, cash on delivery. *It was in legal effect the same as if there had been three contracts for the sale and delivery of one hundred barrels of flour each.* See, also, in the same state, and to the same effect, *Goodwin v. Merrill*, 13 Wis. 658. The court said in *Allen v. McKibben*, 5 Mich. 454, "Where a party fails to comply substantially with his agreement, *unless it is apportionable*, the rule is well settled, that he can not sue upon the agreement or recover upon it at all." And in *Norris v. Harris*, 15 Cal. 227, it was held, that the partial failure of performance of a severable contract did not entitle the other party to a rescission of the whole contract—parts of it might be rescinded which were entire in themselves. (See pp. 256-7.) And it has been held in many cases besides those already cited, that a contract of this kind is practically made up of several distinct agreements: *Coleman v. Hudson*, 2 Sneed 463; *Cole v. Cheovenda*, 4 Col. 17; *More v. Bonnet*, 40 Cal. 251; *Purdy v. Bullard*, 41 Id. 444; *Loomis v. Bank of Rochester*, 10 Ohio St. 327; *Kennedy v. Schwartz*, 13 Nev. 229; *Dugan v. Anderson*, 36 Md. 567. An important point to be observed is, that where the contract is severable, recovery is allowed *on the contract*, not on a *quantum valebat*. As to when the latter, an implied contract, can be sued upon in such cases, there seems to be some little differences among the authorities, but the rule may, probably, be stated as follows: Where the contract is entire, and a benefit has been received under it, if one party break it he may still recover on a *quantum valebat*, a new

contract being implied from the retention of the benefit, and the measure of damages being no longer the original contract price. The original contract is destroyed by the breach; but this is not true of a severable contract, and, therefore, the recovery is upon the contract itself. As to *quantum valebat*, see cases already cited, and *Liggit v. Smith*, 3 Watts 331. Also, notes to *Cutter v. Powell*, 2 Sm. Lead. Cas. 18. It only remains to notice the few cases which sustain, or seem to sustain, the principal case. They are *Bradley v. King*, 44 Ill. 339; *Catlin v. Tobias*, 26 N. Y. 217; *Smith v. Lewis*, 40 Ind. 98, and *King Philip's Mills v. Slater*, 12 R. I. 82. The first case, carefully read, will be seen to have been one of prospective refusal. The terms were cash on delivery of each parcel, and the vendee accepted a parcel and refused to pay cash for it; and this refusal was based upon a claim to set off damages caused by a previous default of the vendors. So that it was a denial of the obligation to pay, and comes within the principle of *Withers v. Reynolds*, viz., that of breach by anticipation. Besides, a late case in the same state, decided last year, denies in express terms the right to rescind in such cases: *Hine v. Klasey*, 9 Brad. App. 166; s. c. Id. 190.

Smith v. Lewis was clearly an entire contract, so held by the court, and for that reason decided as it was. The opinion of the court plainly implies that had the contract been several the result would have been different. The object of the contract was single, and the fact that there were separate items was wholly unimportant.

Catlin v. Tobias is an admirable instance of the rule that the intention of the parties is to govern. The contract was for the delivery of a certain quantity of bottles from time to time, the vendees being manufacturers of medicine. Either party, on failure to perform, was to pay a forfeit. Nothing was said as to the

time of payment, but from the evidence it appeared that it was to be after all the deliveries were made (p. 222). It was held, that the evident intention of the parties was that the contract should be performed in terms, as it was doubtless made by defendant with a view to his requirements in business, i. e., bottling his medicine. The suit was for a single delivery, and that imperfect, and the court said, that conceding it to be a series of separate contracts, the delivery being incomplete could not be recovered on. The referee and court below had held that there were, practically, several contracts, and as a general proposition they were supported fully in this by *Seymour v. Davis*, 2 Sand. S. C. 239; *Deming v. Kemp*, 4 Id. 147. The last page of the court's opinion (p. 223) is very instructive, and shows the way in which this particular contract was regarded, namely, that it was one in which the parties evidently contemplated full performance.

Lastly, the case of *King Philip's Mills v. Slater*, is directly in point, and is entirely in accord with the principal case. But it is supported only by *Hoare v. Rennie*, *supra*, itself unsupported, and the court says in the course of its opinion: "But it is difficult to reconcile the cases, especially the older ones, to our notions of justice." The learned court might well have substituted "impossible" for "difficult." Other cases might be cited in conformity with the authorities given above; but it will suffice to refer, in concluding the question of authority, to the instructive opinion of the court in *The Maryland Fertilizing Co. v. Lorentz*, 44 Md. 218, and to the brief of argument for the appellees in the same case.

And now as to the wisdom of the rule: that the decided weight of authority seems to establish, namely, that rescission will not be allowed of the whole contract except where the breach goes to the entire consideration. It is a familiar principle

of law, that forfeitures are never favored. And there can certainly be no clearer instance of forfeiture, than the loss of an entire bargain because of a breach which has no real effect but upon a small part of it. It is really quite impossible to draw any valid distinction between an agreement like that in the principal case, where there were to be successive deliveries, separately and independently paid for, and a series of distinct agreements on different pieces of paper. As noticed before, each little agreement is complete in itself, and may be rescinded for a breach which destroys it; but to enforce a forfeiture of all the similar agreements for a breach of one is to extend to forfeiture the greatest possible favor. It is perfectly competent for parties to embrace in their contract an express provision for rescission, and this is very frequently done. But it is certainly not consonant with the established policy of the law to *imply* a condition precedent, the breach of which shall work a forfeiture far beyond the damage caused. What-

ever damage such breach does cause, the injured party must of course be compensated for; and that is all he can reasonably ask. Few contractors will fully neglect to carry out their contracts. It would be the worst possible policy. But in large undertakings of this kind unavoidable accidents are apt to occur, and it would, as it seems to me, be monstrous to make a slight deviation from exact performance an opportunity for the other party to annul the bargain at his pleasure. To *imply* such intention is to credit the vendors with most unbusinesslike rashness.

It is impossible to deny the logic of the opinion in the principal case. It is certainly more accurate to call these agreements "transactions" than "contracts;" but as has been well said, there is no magic in words. And it is conceived that principle and the authorities will hardly warrant the Supreme Court in sustaining the decision.

LUCIUS S. LANDRETH.

Philadelphia.

Superior Court of Cook County, Illinois.

SMITH v. BARCLAY.

Certificates of membership in the Board of Trade of Chicago are property, and as such are liable for the debts of the owner on a creditor's bill to subject them to the payment of his debts; and the debtor will be restrained from disposing of his certificate of membership, and ordered to execute a blank assignment thereof to the receiver appointed in the cause.

CREDITORS bill against the debtor and the Board of Trade of Chicago for discovery as to the debtor's ownership of a certificate of membership in the Board, and as to the nature and value of such certificate, and for an injunction to restrain the transfer thereof.

The answers of the defendants set forth that the debtor was a member of the Board of Trade in good standing, and was the owner of a certificate of membership, which was transferable only

in accordance with the rules of the board; that the market value of such certificate, if transferable under the rules, was about \$1200, that there were about eighteen hundred members of the board and a large surplus in its treasury. The answers denied that the certificate was subject to compulsory transfer by order of the court, or liable in any way to the payment of complainant's debt.

On the hearing, it appeared that the fee for membership was \$5000; that the value of certificates was \$4000; that they were bought and sold on the market, held on speculation, and hypothecated for loans; that proper persons applying for admission to membership were always admitted; that certificates were held by dealers and commission men in the names of their brokers and employees; that when lost they were renewed, and that they were frequently transferred, the rules in that regard being complied with. The Act of Incorporation, section 6, provided: "Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations and by-laws thereof." The rules contained various provisions for the discipline, suspension, restoration, &c., of members, and also contained the following:—

"Rule XI.—Section 1. Any person of good character and credit, and of legal age, on presenting a written application, endorsed by two members, and stating the name and business avocation of the applicant, after ten days' notice of such application shall have been posted on the bulletin of the Exchange, may be admitted to membership in the association upon approval by at least ten (10) affirmative ballot votes of the board of directors, and upon payment of an initiation fee of \$5000; or on presentation of a certificate of unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the rules, regulations and by-laws of the association, and all amendments that may, in due form, be made thereto.

"Sect. 2. Every member shall be entitled to receive a certificate of membership, * * * and if the member in whose name said certificate stands, has paid all assessments due, and has against him no outstanding, unadjusted or unsettled claims or contracts held by members of the association, and said membership is not in any way impaired or forfeited, it shall, upon the payment of ten dollars, be transferable upon the books of the association to

any person eligible to membership who may be approved by the board of directors, after due notice, as provided in section 1 of this rule. The membership of a deceased member shall be transferable in like manner by his legal representative. Prior to the transfer of every membership, notice of application for such transfer shall be posted upon the bulletin of the Exchange for at least ten days, when, if no objection is made, it shall be assumed the member has no outstanding claims against him."

The form of certificate issued by the board is as follows :—

" ——— is a member of the Board of Trade of the city of Chicago, in full and regular standing at the date thereof. The membership hereby represented is subjected to annual assessments, which being paid when due, it is transferable on the books of the corporation to any person approved by the board of directors upon surrender of this certificate and any current ticket of admission to the Exchange rooms of the board issued on account of it. Such transfers may be made in writing by the party herein named, or his legal representative in form as provided on the reverse hereof."

Printed on the back appears :—

"For value received, I hereby transfer and assign unto ———, the membership in the Board of Trade of the city of Chicago, represented by the within certificate, subject to the rules and regulations of said Board of Trade, and provided said membership is found not to be forfeited or impaired."

The opinion of the court was delivered by

GARDNER, J.—As is seen, the question presented is, whether the membership of Barclay in the Board of Trade, represented by his certificate, is property which can be reached by a creditor and appropriated in any way to the payment of his debt.

So far, the state courts in Illinois have not passed upon the question, and when reference is made to the precedents in other courts, the decisions are not found to be uniform, nor are they numerous. Taking them chronologically, we find, in 1874, in *Hyde v. Woods*, 2 Sawyer 655, a case in which both parties seemed to assume that a membership in the San Francisco Stock Exchange was property, and the struggle was over the proceeds, the controversy being as to whether they should go to the creditors of the member who were members of the Exchange, as provided by its rules, or to his general creditors. The court assumed the

view that it was property, but limited and qualified by the conditions and provisions of the rules of the Exchange, which gave it to the creditors who were members of that body, and disposed of the proceeds accordingly. The case went to the Supreme Court of the United States, and is reported. (*Hyde v. Woods*, 4 Otto 523.) In that court the nature of the membership appears to have been discussed, and the court say: "There can be no doubt that the incorporeal right which Fenn had to his seat when he became bankrupt was property, and the sum realized by the assignee from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that if he had made no such assignment it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy, and that if there been left in the hands of the defendants any balance after paying the debts due to the members of the board, the balance might have been recovered by the assignee." Farther on in the opinion the court again refers to the membership as property, subject only to the conditions imposed by the rules of the exchange.

In 1876, the question arose in the United States District Court, for the Northern District of Illinois, in a bankruptcy case, reported as *In re Sutherland*, 6 Bissell 526, and Judge BLODGETT held that a membership in the Chicago Board of Trade was not property, and did not go to the assignee in bankruptcy; that the certificate of membership conferred "no property right," but only "a mere personal privilege," and likened it to a membership in a Masonic body, or a religious or social organization.

In 1877, the same question arose in the Superior Court of the city of New York, in *Ritterband v. Baggett*, 4 Abb. N. C. 67, where, in a proceeding supplementary to execution, in substance like the case at bar, and where the claim was that a membership in the New York Cotton Exchange was not property which should go to the receiver, the court held otherwise, and referred to *Hyde v. Woods*, 4 Otto 523.

In 1880, in a case not yet reported, but referred to in 10 Central Law Jour. 500, and Albany Law Jour. 501, as *Grocers' Bank v. Murphy*, the Common Pleas Court of New York city decided exactly the opposite to the decision above cited in the Superior Court of that city.¹

¹ This case was reversed on appeal. See Dos Passos on Stock Brokers 91; N. Y. Daily Reg., March 12th 1881.

In 1880, in two cases in the Supreme Court of Pennsylvania, viz.: *Thompson v. Adams*, 93 Penn. St. 55, and *Pancoast v. Gowen*, Id. 66, that court held a seat in the Philadelphia Board of Brokers as "not property in the eye of the law," but a mere "license to buy and sell at the meetings of the board," and not subject to execution, attachment or garnishment at the suit of a creditor. *Hyde v. Woods*, is referred to, but not regarded as authority on the principal question.

In 1880, in the United States District Court, for the Southern District of New York, reported as *In re Ketchum*, 1 Fed. Rep. 840, a case in bankruptcy, in which there was an application for an order requiring the bankrupt, Ketcham, to make a transfer of his seat in the New York Stock Exchange to the assignee in bankruptcy, or to such person as the assignee may procure as a purchaser, the court sustained the motion and made the order.

The court, CHOATE, J., says: "I think the case cannot be distinguished in principle from the case of *Gallagher v. Lane*, 19 N. B. R. 224, in which it was determined that a Washington market lease was property that belonged to the assignee. As in that case the consent of the city was necessary to transfer, so here the consent of a committee of the Stock Exchange is necessary to a transfer of this right. The seat, however, has an actual pecuniary value, which the rules of the society, as interpreted and applied in practice, permit the holder to realize by a sale and transfer. There is no practical difficulty in effecting a transfer of this right or interest for a pecuniary consideration, subject to the condition that the debts of the present holder to members are first paid; and the right or privilege is to all intents and purposes a business right or privilege, useful for business purposes only. I see nothing in the rules of the Exchange which renders it impossible for the seat to be disposed of by the assignee in bankruptcy, with the co-operation of the bankrupt, subject to the condition above mentioned. The equity of the creditors in the matter is as obvious as in the case of the market lease. This seat in the board was actually used as a part of the business capital of these bankrupts as stockbrokers. To suffer the bankrupts still to hold it virtually withdraws several thousand dollars in value of their business assets from the creditors."

Hyde v. Woods, 4 Otto 523, is in no way distinct from the one under consideration. "The controlling consideration is, as it

seems to me, that practically, and whatever its form or incidents with respect to other matters may be, it is a part of the bankrupt's business assets, or more generally, of his property, which it was the primary design of the bankrupt law to distribute among his creditors, and that the peculiarities which distinguish this from other property are, in view of the evident purpose and scope of the bankrupt law, unessential; mere technicalities—cobwebs—which the law is strong enough to break through.” [Per CHOATE, J., *In the matter of Ketchum, supra.*]

So far as is disclosed in the reports, in all these cases the provisions of the various boards regarding memberships and their transfer were, in all essential matters, similar to those of the Chicago Board of Trade, some of them rather narrower, in that transfers could only be made to members elect, while, as we have seen, the provision of the Chicago Board makes them transferable “to any person eligible to membership, who may be approved by the Board of Directors,” a distinction, perhaps, with little practical difference.

As is seen, the authorities are conflicting, but it seems to me that the weight of sense and reason is with those which hold these memberships are property.

An actual investment of a large sum of money is necessary for their procurement; they are available as assets, either by sale or hypothecation, they are transferable by the holder, or his legal representative in case of his decease; the conditions attending their transfer are, practically easy of fulfilment, and their conversion into money, or money's worth, at the will of the holder, is a matter of no practical difficulty. To hold them not property is to place beyond the reach of the law a large amount of actually available and convertible assets which, in almost any other conceivable form, could be readily reached by the proper legal methods, and appropriated to the payment of the debts of the holder.

Let a decree be entered enjoining the defendant, Barclay, from otherwise disposing of his certificate of membership, and that he execute a blank assignment of such certificate, and deliver the same with such certificate, and the ticket of admission issued thereon to the receiver in this cause.

Unincorporated stock exchanges, constituted, are neither joint stock companies of brokers or boards of trade, members thereof, whatever may be their in the manner in which they are usually

relations to third parties: *White v. Brownell*, 4 Abb. Pr. (N. S.) 162, 191; s. c. 3 Id. 318; *Leech v. Harris*, 2 Brewst. 571, 575; *Caldicott v. Griffiths*, 8 Exch. 898; 1 Lind. on Part. *56, 57.

There may be property belonging to such a body, derived from the payment of dues or fines, or consisting of the furniture of the room where the board meets; but the possession of it is a mere incident, and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportionable part of it upon withdrawing. He has merely the enjoyment and use of it while a member, but the property remains with and belongs to the body while it continues to exist; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets: *White v. Brownell*, *supra*. Per DALY, F. J., citing, *St. James Club*, 13 Eng. L. & Eq. 592; *Fassett v. First Parish in Boylston*, 19 Pick. 361.

As to the nature of the right of membership, a seat in one of these bodies is said to be a species of incorporeal property—a personal, individual right to exercise a certain calling in a certain place, but without the attributes of descendibility or assignability which are characteristic of other species of property: *Dos Passos on Stock Brokers* 87. The ownership of a seat is not absolute and unqualified, but is limited and restricted by the rules of the body issuing the same. The owner can not sell the seat to a person whom the body will not recognise: *Hyde v. Woods*, 94 U. S. 523; *Dos Passos on Stock Brokers* 87, citing *White v. Brownell*, 3 Abb. Pr. (N. S.) 318; *Leech v. Harris*, 2 Brewst. 571. Neither can it be directly seized on attachment or execution at the suit of a creditor of the owner: *Allen, Jr. v. N. Y. Cotton Exchange*, N. Y. Daily Reg., March 31

1881; *Pancoast v. Gowen*, 93 Penn. St. 66; *Thompson v. Adams*, 93 Penn. St. 55. In *Pancoast v. Gowen*, *supra*, the court in delivering their opinion, say: "A seat in the board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately, a license to buy and sell at the meetings of the board. It certainly could not be levied on and sold under a *fi. fa.* The sheriff's vendee would acquire no title which he could enforce, nor is it within either the words or the spirit of the Act of June 16th 1836, sect. 35 (Pamph. L. 767), providing for attachment on judgment. Whether the proceeds of the sale of the seat in the hands of the treasurer of the board, and payable to the defendant, according to the regulations and by-laws of the board, could be thus reached, is an entirely different question. This, and no more, is what we understand to have been decided by the Supreme Court of the United States in *Hyde v. Woods*, 4 Otto 525, where Mr. Justice MILLER says, 'If there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee' in bankruptcy." In this case upon a judgment obtained by *Pancoast* against *Houston*, an attachment execution was issued and served upon *Gowen* and others, trading as *The Philadelphia Stock Exchange*, as garnishees. The answers of the garnishees admitted that *Houston*, the defendant in the judgment, owned a seat in the stock exchange, against which there were no claims by the members of that body at the time the attachment was issued, but they alleged that claims had since been presented, and that *Houston* held his seat subject, among others, to the conditions below stated; so that the real question involved in the case appears to be whether the seat was subject to direct sale on an attachment-

execution or writ of garnishment; and, there having been no attempt to invoke the equity powers of the court, it does not appear to have been necessary to decide that a membership was in no sense property, and hence there is no real conflict between this case and those cases where the equity powers of the court were invoked. In *Evans v. Wister*, Sup. Ct. Penn., 1 Weekly Notes Cases 181, it was also held, that an attachment would not lie against the board of brokers for the proceeds of the sale of the seat of a member who was indebted to other members to an amount exceeding the proceeds of his seat.

In *Thompson v. Adams*, *supra*, the court says that the seat is not property in the eye of the law, and cannot be seized in execution for the debts of the members; but the point actually decided was, that under the constitution and by-laws of the board, an equitable owner of a seat, who has furnished the money with which the legal owner obtained the seat, but who is unknown to the association, can not share in the proceeds of the sale of the seat upon the death of the legal owner, as against members of the board who are creditors of the legal owner. By the constitution of the Philadelphia Stock Exchange, a seat in which was in controversy in the cases above cited, members held their seats subject to the following conditions: Any member had the right to sell his membership to such person as should be approved by the board, provided there were no unsettled contracts or claims against him by any member of the exchange for stock transactions; and on the death of a member his seat might be sold by the secretary, and after satisfying the claims of members, the balance was to be paid to his personal representatives. The proceeds of a seat, if sold, were to belong to the owner's creditors, being members of the exchange, in proportion to the amounts of their respective claims. Similar pro-

visions appear to have been adopted in the various stock boards throughout the country, so far as we can judge by the reported cases.

Although, however, the seat of a member cannot be levied upon and sold by direct legal process, the better opinion seems to be, as held in the principal case, that a membership in such a body, especially where, as in the principal case, it is so treated by the rules and practice of the board, is a species of property, and that the courts will, by the exercise of their equity powers, or by process in aid of execution, compel an insolvent member to do whatever may be needful to transfer his seat under the rules of the board, and apply the proceeds in satisfaction of his debts: *Dos Passos on Stock Brokers* 92; *Grocers' Bank v. Murphy*, N. Y. Daily Reg., March 12, 1881; *Ritterband v. Baggett*, 4 Abb. N. C. 67; *Campbell v. N. Y. Cotton Exchange*, N. Y. Daily Reg., January 11, 1881; *In re Ketcham*, 9 Rep. 305; s. c. 1 Fed. Rep. 840. See, also, *Hyde v. Woods*, 94 U. S. 523. The weight of authority, also, seems to be that the incorporeal right of membership in such a board passes to the assignee in bankruptcy of the owner, subject to the rules of the stock board: *Hyde v. Woods*, *supra*; *In re Ketcham*, *supra*. See, however, *contra*, *In re Sutherland*, 6 Biss. 526.

The law upon this subject has been excellently summarized by Mr. Dos Passos, in his recent work on Stock Brokers and Stock Exchanges, page 96, as follows:

"All the cases can be reconciled by keeping in view the circumstances under which they arose; and the following propositions may be deemed as settled:

1. "That, in the disposition of a seat, or the proceeds thereof, the members of the exchange will be preferred to outside creditors.

2. "That the seat is not the subject

of seizure and sale on attachment and execution.

3. "That the proceeds of a seat, in the hands of the exchange or its officers, are capable of being reached, after the claims of members have been satisfied, to the same extent, and in the same manner, as any other money or property of a debtor.

4. "That a person owning a seat in the exchange, can be compelled, by proceedings subsequent to execution, or under the direction of a receiver, to sell his seat to a person acceptable to the exchange, and devote the pro-

ceeds to the satisfaction of his judgment debts."

As to the point discussed in the principal case the cases do not seem to make any distinction, and there does not seem to be any distinction in principle between unincorporated boards, and those which have been incorporated, so long as the objects of the boards and their rules and regulations are the same; and tested by the cases above cited, the ruling in the principal case would seem to be correct in principle, and well grounded on authority.

MARSHALL D. EWELL.

Chicago.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ARKANSAS.²

SUPREME COURT OF IOWA.³

SUPREME JUDICIAL COURT OF MAINE.⁴

SUPREME COURT OF OHIO.⁵

SUPREME COURT OF WISCONSIN.⁶

AGENT.

Promissory Note—Payment.—Authority to sell property as agent, and take a note therefor in the name of the principal, does not include authority to receive payment of the note after it has been delivered to the principal: *Draper v. Rice*, 56 Iowa.

ATTACHMENT. See *Garnishment*.

ATTORNEY.

Authority to release Attachment.—An attorney-at-law, having control of a suit, has control of the remedy and the proceedings connected therewith, and may release an attachment of real or personal property, and such release will bind his client as between such client and a party

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

² From B. D. Turner, Esq., Reporter; to appear in 37 Arkansas Reports.

³ From Hon. John S. Runnells, Reporter; to appear in 56 Iowa Reports.

⁴ From J. W. Spaulding, Esq., Reporter; to appear in 73 Maine Reports.

⁵ From E. L. DeWitt, Esq., Reporter; to appear in 37 or 38 Ohio St. Reports.

⁶ From Hon. O. M. Conover, Reporter; to appear in 54 Wisconsin Reports.

purchasing or taking a mortgage of such released estate on the strength of such release: *Beason v. Carr*, 73 Me.

BILLS AND NOTES. See *Agent*; *Surety*.

Evidence to vary Terms of—Payment.—The maker of a note cannot show, as a defence thereto, that he has paid it to another than the payee, in accordance with a contemporaneous parol agreement, differing in its terms from the note: *Draper v. Rice*, 56 Iowa.

Holder as Collateral—Rights against Accommodation Endorser.—One not induced by fraud who endorses a negotiable promissory note owned by another, for his accommodation, without restriction as to its use, is liable to an endorsee who receives it in good faith from the owner, before due, as collateral security for an antecedent debt of such owner, although there be no other consideration for giving such collateral: *Pitts v. Foglesong*, 37 or 38 Ohio St.

Boxborough v. Messick, 6 Ohio St. 448, distinguished: *Id.*

BOND. See *Officer*.

CONSTITUTIONAL LAW. See *Taxation*.

Canal—Lease of Surplus Water—Right of State to Abandon—Obligation of Contracts.—By the laws of a state the board of public works were authorized to lease, for hydraulic purposes, the surplus water in canals, reserving in each lease the right to resume the privilege when deemed necessary for the purposes of navigation. The board leased certain water privileges in a canal running through a city. Subsequently a statute was passed granting a portion of the canal to the city, and virtually abandoning it as a canal. In a suit against the city by the lessees of the water privileges for a destruction of their supply, *Held*, that after the canal was no longer needed for navigation the state was not bound to maintain it for the benefit of the lessees of the water, and that the statute abandoning it was, therefore, not within the constitutional prohibition against impairing the obligation of contracts, but was valid: *Fox v. City of Cincinnati*, S. C. U. S., Oct. Term 1881.

License Law—Discrimination against other States.—The Statute of Arkansas (Gantt's Dig., sect. 1876, *et seq.*) defining peddlers and imposing license on them, discriminates in favor of the products and manufactures of this state, and against those of other states, and is, therefore, unconstitutional and void: *State v. McGinnis*, 37 Ark.

Power of Legislature to change County Limits—Apportionment of Indebtedness.—The legislature may, according to its own views of public policy and convenience, enlarge or diminish the powers of counties, and may extend, limit or change their boundaries, without the consent of the inhabitants, except that by the Constitution, "no part of a county shall be taken off to form a new county without the consent of a majority of the voters in such part proposed to be taken off:" *Pulaski County v. County Judge of Saline County*, 37 Ark.

The legislature may require of a county, to which a part of another territory has been attached, payment of part of the latter's indebtedness, and may direct how the debt shall be ascertained; and when the act

designates the time for the adjustment of the amount by the County Court from which the territory is severed, the other county to which it is attached has notice, and may contest the correctness of the adjustment, and appeal it to the Circuit Court : *Id.*

CRIMINAL LAW.

Discretion of Court in rejecting Juror—Accomplice—Declarations of Wife of Co-defendant—Retiring Jury.—It is the province of the Circuit Court, in the exercise of a sound discretion, to determine the qualification of a juror challenged for bias, and this court will not say that the discretion is abused by admitting a juror who says, upon examination, that he has formed an opinion of the guilt or innocence of the accused, upon rumor, that will require evidence to remove, but that he has no bias or prejudice against him, and can try the case impartially and without prejudice to his rights : *Casey v. The State*, 37 Ark.

An accomplice who is not indicted, or is separately indicted, is a competent witness, though convicted, if he has not been sentenced : *Id.*

The declarations of an alleged accomplice, in the absence of the defendant, are not admissible against him until other evidence than that of the principal is produced, implicating the declarant in the offence : *Id.*

In this state the wife of one who is jointly indicted with the defendant on trial is not a competent witness for him : *Id.*

Requiring the jury to retire during the argument of instructions is a matter of practice within the discretion of the court, and is not objectionable : *Id.*

Bribery—Common-Law Offence—Attempt to influence Elector.—Bribery at a municipal election is a misdemeanor punishable by the common law of this state : *State v. Jackson*, 73 Me.

An attempt to bribe or corruptly influence the elector, although not accomplished, will subject the offender to an indictment : *Id.*

Willfully and unlawfully attempting to influence an elector to give in his ballot at such election, by offering or paying him money therefor, is a crime at common law in this state : *Id.*

DAMAGES.

Railroad—Wrongful Ejection of Passenger—Action for Damages in Tort—Proximate Consequences.—An action for damages for the sickness and bodily and mental suffering of plaintiff and wife caused by their ejection from the cars of defendants' railroad before reaching the destination to which they were travelling as passengers, is in tort and not upon contract, and defendant is liable for all the injuries resulting directly from his wrongful act : *Brown v. C. M. & St. Paul Railway*, 54 Wis.

The direct or proximate consequences of a wrongful act are those which occur without any intervening independent cause; and the fact that the injuries chiefly complained of were caused immediately by the act of plaintiffs in walking from the place where they left the cars to the next station will not relieve defendant from liability therefor, where it appears that plaintiffs' act in so walking was rendered apparently necessary by defendant's wrongful act, and was not negligent : *Id.*

Action for Personal Injuries—Profits from Business.—In an action for

personal injuries to the plaintiff, which disqualified him to give his personal attention to the business which he had previously carried on, where such business consisted in the manufacture and sale of patented and other machines, it was error to admit proof of the average profits of his business while he carried it on, as a basis for estimating his damages, such a basis being of too uncertain and speculative a character: *Bierbach v. Goodyear Rubber Co.*, 54 Wis.

DEED.

Delivery to Husband of Grantee.—A deed to property delivered to the husband of the grantee, with the intention on the part of the grantor that such delivery should pass the title, was held to divest him of the title and vest it in the grantee, although it was made without her knowledge and was not delivered to her by her husband, but came into her possession some months afterward: *Parker v. Parker*, 56 Iowa.

EMINENT DOMAIN. See *Waters and Watercourses*.

EQUITY.

Master of Vessel—Sailing on Shares—Account.—A bill in equity by the owners of a vessel against the master who had taken her on shares cannot be maintained when no discovery is sought for and the prayer is to render an account of her earnings: *Bird v. Hull*, 73 Me.

The plaintiffs in such case have an ample remedy at law: *Id.*

ERRORS AND APPEALS.

Amount in Controversy—Contest between Creditors over a Fund—Jurisdiction determined by aggregate Shares of Contesting Creditors.—Upon an appeal from a decree dismissing a bill filed by certain creditors to set aside a deed under which another creditor claimed a fund in court, if it appears that the creditors filing the bill represent no one but themselves; that in the event of success they alone can take advantage of the decree, and that, if successful, their aggregate shares in the fund would amount to less than five thousand dollars, the appeal will be dismissed for want of jurisdiction, notwithstanding that both the fund and the aggregate amount of claims provable against it are more than that amount: *Chatfield v. Boyle*, S. C. U. S., Oct. Term 1881.

Death of Appellant—Effect of.—A judgment of reversal is effective notwithstanding the death of the plaintiff in error during the pendency of proceedings in error. Such judgment takes effect, by relation, as of the date of the commencement of the proceeding in error; and it is competent for the court, to which the cause is remanded for a new trial, to order a revivor of the action in the name of the proper representative of the deceased party: *Williams v. Englebrecht*, 37 or 38 Ohio St.

ESTOPPEL.

Admission of Indebtedness—Garnishment.—The mere facts that during the pendency of an action for a money judgment by plaintiffs against T. B., knowing that plaintiffs were making the inquiry with a view to determining whether they should garnishee him, admitted an

indebtedness on his part to T., and that plaintiffs were thus induced to commence garnishment proceedings against him, does not estop him from afterwards denying the existence of such indebtedness; though such admission is evidence for the jury as to the fact of indebtedness: *Warder v. Baker*, 54 Wis.

EXECUTORS AND ADMINISTRATORS. See *Garnishment*.

GARNISHMENT.

Executor or Administrator.—An executor or administrator is not subject to garnishment before a final order for the distribution of the estate is made; and where he is summoned as garnishee before the making of such order, judgment cannot be taken against him therein after the order is made. Whether he is subject to garnishment after such final order, is not here determined: *Case Threshing Machine Co. v. Miracle*, 54 Wis.

Jurisdiction—Non-Resident Defendant—Indebtedness of Garnishee subsequent to Attachment.—Where in an action against a non-resident defendant, which was commenced by attachment served by garnisheeing a supposed debtor of the defendant, and the defendant was served by publication only, the answer of the garnishee showed that it was not indebted to the defendant at the time of the service of the attachment, it was held that the court acquired no jurisdiction to proceed in the action, though such answer disclosed an indebtedness to the defendant at the time it was made: *Morris v. The Union Pacific Railroad Co.*, 56 Iowa.

GIFT.

Deposit in Savings Bank in Name of Another.—When A. having seventeen hundred dollars in a savings bank, made a further deposit in the name of B. without his knowledge, of two thousand dollars, retaining the pass-book till death, and drawing the dividends and such portions of the principal for her own use as she chose; *Held*, 1, that the title to the deposits remained in the depositor and subject to her control; 2, that if the deposit was in trust, that B. was trustee for the depositor and not *cestui que trust*: *Northrop v. Hale*, 73 Me.

INSURANCE.

Life Policy—Forfeiture in case of Travel beyond stipulated Limits—Waiver.—A. obtained a policy of life insurance containing a condition of forfeiture in case he should travel south of a certain parallel of latitude. On September 26th 1878, he went to a city south of such limit, and while there, died October 15th 1878. On October 17th 1878, his brother-in-law, in ignorance of his death and at the suggestion of the local agent of the insurance company, paid to such agent \$20 for a southern permit for A. and received a receipt therefor. The local agent forwarded the money to the state agents of the company, who acknowledged its receipt. Shortly afterwards and before any permit had been actually issued, news of A.'s death was received. Afterwards, the local agent tendered back the \$20 to the brother-in-law, who refused to receive it. *Held*, that the receipt by the local agent of the money for a permit was not under the circumstances a waiver by the company of the for-

feiture. *Bennecke v. Conn. Mut. Ins. Co.*, S. C. U. S., October Term 1881.

MASTER AND SERVANT.

Railroad—Negligence—Examination of Car received from other Road.—One railroad company receiving a loaded car from another, and running it upon its own road, is not bound for the protection of its employees to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact: *Bullou v. C. & N. W. Railway Co.*, 54 Wis.

MECHANIC'S LIEN.

Who entitled to—Implied Contract for Labor—Overseer.—One who performs labor for a contractor in the erection of a building may establish a lien against the building therefor, though no express contract for payment was made: *Foerder v. Wesner*, 56 Iowa.

The fact that one who performs labor on a building also acts as overseer of other workmen will not defeat his right to a mechanic's lien: *Id.*

MORTGAGE. See *Trover*.

Railroad Mortgage—Foreclosure Suit—Decree—Finding as to amount due—Stipulation as to Request of Bondholders.—In a suit for foreclosure it is not necessary that there should be two decrees, one finding the amount due and fixing a day for payment, and the other finding default in such payment and ordering a sale. All these matters may be embraced in one decree: *Chicago, D. & V. Railroad v. Fosdick*, S. C. U. S., Oct. Term 1881.

Such a decree should declare the fact and nature of the default on which the bill is founded, the amount due, a time within which that amount must be paid, and a direction that in case of default in such payment the property shall be sold: *Id.*

In such decree the finding of the amount due is the foundation of the mortgagee's right to further proceed, and a substantial error in that finding will vitiate all subsequent proceedings: *Id.*

A railroad mortgage provided that after the principal of the bonds had been declared by the trustee to have become due, the trustees should, "upon the written request of the holders of a majority of the said bonds," proceed to collect the principal and interest by foreclosure. *Held*, that without such written request of the bondholders the trustees had no power to proceed to foreclose the mortgage: *Id.*

NEGLIGENCE. See *Railroad*.

OFFICER.

Bond—Duties added after Execution.—An official bond conditioned for the faithful discharge of the duties of an office "according to law," embraces duties required by laws in force during the terms of the officer, whether enacted before or after the execution of the bond: *Dawson v. The State*, 37 or 38 Ohio St.

King v. Nichols, 16 Ohio St. 80, approved: *Id.*

PARTNERSHIP.

Sale of entire Business by one Partner—Constructive Trust.—Though a partner may sell a part or the whole of any of the effects of the firm which are intended for sale if the sale be within the scope of the partnership business, yet he cannot, without the consent of the other partners, dispose of the partnership business itself, nor of all the effects, including the means of carrying it on. This is without the range of his implied powers, and contrary to the objects and designs of the association: *Drake v. Thyng*, 37 Ark.

When a partner, in the absence of his copartner who has furnished the capital, sells the partnership effects and business at a sacrifice, to parties having knowledge of the interest of the copartner, and when there is no necessity for the sale, a constructive trust will attach to the property in the hands of the purchasers, and as trustees they and the vendor will be held to a rigid accountability to the copartner: *Id.*

PLEADING.

Declaration—Sale—Payment in Goods.—When goods are sold to be paid for wholly or in part by other goods, or in labor, or otherwise than in money, an action to recover the same must be by special count on the agreement, and for a breach of it, and not for goods sold and delivered: *Slayton v. McDonald*, 73 Me.

PRACTICE.

Action of Tort—Joinder of Defendants—Verdict against one alone.—In an action to recover for a tort, in which two are joined as defendants, and it is alleged that the tort was committed by them jointly, the jury may find that it was committed by one defendant alone, and judgment may properly be rendered against him therefor: *Boswell v. Gates*, 56 Iowa.

RAILROAD. See *Master and Servant*; *Mortgage*.

Negligence—Presumption—Evidence.—In an action against a railroad company to recover damages for killing live stock, the plaintiff must prove, affirmatively, that want of ordinary care on the part of the company or its employees caused the injury: *Pitts. C. & St. Louis Railway Co. v. McMillan*, 37 or 38 Ohio St.

Such inference does not arise from the mere fact that the animal was killed: *Id.*

Occupation of Street—Compensation to Property Owners—Injunction.—Where the construction of a railroad in a street of a city, will work material injury to the abutting property, such construction may be enjoined, at the suit of the owners, until the right to construct such road in the street shall first be acquired, under proceedings instituted against such owners as required by law for the appropriation of private property: *Scioto Valley Railroad v. Lawrence*, 37 or 38 Ohio St.

In such case it is immaterial whether the fee is vested in the city or in the abutting owners, so long as it is held upon the same defined uses: *Id.*

Railway Co. v. Cummins, 14 Ohio St. 524, approved: *Id.*

SHIPPING. See *Equity*.

STATUTE OF FRAUDS.

Assumption by Partner of Debts due the Firm.—If, upon the close of a partnership, one partner takes to his own use a portion of the assets, whether choses in action or anything else, on an oral agreement to account to his copartners for a definite share, it is a separate and direct agreement, on a new consideration, and not within the Statute of Frauds: *Conger v. Cotton*, 37 Ark.

STREET. See *Railroad*.

SURETY.

Addition of other Sureties—Discharge of Liability.—Where, after a note has been signed by the principal maker and a surety, and delivered to the payee, it is signed by others as sureties, without the knowledge and consent of the one first signing, he is thereby discharged from liability thereon: *Berryman v. Manker*, 56 Iowa.

TAXATION.

Federal Tax—Illegal Assessment—Refunding—Court of Claims—Limitation of Time.—The court of claims has jurisdiction of a suit to recover from the government the amount of a claim for taxes illegally collected, which claim had been duly presented to the commissioner of internal revenue and allowed under sects. 3220 and 3228 Rev. Stat.: *United States v. Real Estate Saving Bank*, S. C. U. S., Oct. Term 1881.

The regulations of the secretary of the treasury, made in accordance with sect. 3220, having prescribed that claims for the refunding of taxes should be presented through the collectors of the respective districts, a claim presented to such collector within the period limited by sect. 3228 for presentation, is in time although not forwarded by the collector to the commissioner of internal revenue until after such period: *Id.*

Constitutional Law—Uniformity—Decisions of Tax Officers—Fraudulent Discrimination.—Statutory provisions, whereby different classes of property are listed and valued for taxation in and by different modes and agencies, are not necessarily in conflict with the provisions of the Constitution which require all property to be taxed by a uniform rule, and according to its true value in money: *Wagoner v. Loomis*, 37 or 38 Ohio St.

As a general rule, the decisions of officers and tribunals specially created and charged, in tax laws, with the duty of valuing property for taxation and equalizing such valuations, are final and conclusive: *Id.*

Even in case of fraudulent discrimination equity will not relieve a taxpayer whose property is not assessed in a greater amount than would have been imposed upon it, in case all the taxable property of the state had in fact been assessed by a uniform rule and according to its true value in money: *Id.*

TORT. See *Practice*.

TRESPASS.

Parol License—How Pleaded—Revocation.—In an action for a trespass to land, if defendant relies upon a license, it must be specially pleaded, and cannot be given in evidence under the general issue; but

it is sufficient if the facts constituting the license are averred: *Lockhart v. Geir*, 54 Wis.

A mere license may be by parol, and is a defence as to all acts embraced within its terms, committed before its revocation; but the commencement of an action for damages by the licensor is a revocation: *Id.*

TRIAL. See *Practice*.

Charge—Binding Instruction—When Allowable.—Even in a case where it would not be improper for the court, in the exercise of its discretion to leave the case to the jury, it may give a binding instruction to find for defendant, if it is satisfied that conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is not sufficient to warrant a verdict for plaintiff: *Stewart v. Town of Lansing*, S. C. U. S., Oct. Term 1881.

Charge—Weight of Number of Witnesses.—It is error to charge the jury that, "if the witnesses are equally credible, and they so present themselves to the mind of the jury, then the greater number of witnesses on one side or the other would be entitled to the greater weight:" *Bierbuch v. Goodyear Rubber Co.*, 54 Wis.

TROVER.

Mortgage—Wrongful refusal to Assign.—Where the mortgagee assigned a mortgage of real estate and the notes secured thereby, to secure a loan to him from the assignee, payable at a specified time, and the loan not being repaid on time, the assignee foreclosed the mortgage, and after such foreclosure was perfected, the assignor tendered the amount due, and demanded the notes and mortgage which the assignee refused to assign or transfer. *Held*, that trover would not lie for the same: *Rice v. Dillingham*, 73 Me.

Whatever remedy the assignor may have is in equity: *Id.*

TRUST. See *Gift*.

VENDOR AND VENDEE.

Vendor's Lien—Land Sold for Merchandise.—Where one sells land for cotton, to be afterwards delivered, he has no lien on the land for performance. The non-delivery creates no debt, but only an injury sounding in damages, which equity will not liquidate, and then declare a lien to pay them: *Harris v. Hanie*, 37 Ark.

Assignee of Contract—Personal Liability of.—The assignee of a contract for the sale of real estate, by accepting the assignment, becomes a party to the contract, and personally liable thereon for the purchase-money then unpaid: *Wightman v. Spofford*, 56 Iowa.

WATERS AND WATERCOURSES. See *Constitutional Law*.

Riparian Owners—Damage to by Improvement of Navigation.—Riparian owners on a navigable stream cannot recover damages for a diversion of the water by the state, or by a corporation acting by authority of the state for the improvement of the navigation. *Arimond v. Green Bay & M. Canal Co.*, 31 Wis., 316, and *Delaplaine v. C. & N. W. Railway Co.* 42 Wis., 230, distinguished: *Black Rv. Imp. Co. v. La. C. Booming & Trans. Co.*, 54 Wis.

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EXPERT TESTIMONY—SCIENTIFIC TESTIMONY IN THE EXAMINATION OF WRITTEN DOCUMENTS, ILLUSTRATED BY THE WHITTAKER CASE, &c.

EXPERT (in law) is "one who is expert or experienced; a person having skill, experience or special knowledge on certain subjects or professions, *a scientific witness*."

One of the definitions of the word science is, "Knowledge; that which one knows."

One definition given by Webster is, "Any branch or species of knowledge."

Webster's definition of the word "expert" is, "An expert, skilful or practiced person; one who has skill, experience or peculiar knowledge upon certain subjects of inquiry in science, art, trade, or the like; a scientific witness." This definition would include every person who is skilled in any business, art or trade whatever; and in law, any such person, when called as a witness in a court of justice, might be entitled to be classified under the head of an expert or a scientific witness in that particular department of human pursuit in which he could claim to be skilled. Scientific or expert testimony, then, in this view of the subject, would include the investigation and ascertainment of certain classes of facts and their statement in fixed terms. This definition thus far involves no conclusion or opinion on the part of the expert as to the relation or bearing of such facts in a

given case. It places this class of testimony on the same ground as all other testimony in this respect. This, as I have said in a former paper, would seem to be the true position of the expert witness in all those cases where it requires no special learning or skill to understand the bearing of the ascertained facts. It happens in a large number of cases in which the expert witness is called to testify, perhaps in all of the class under discussion, that an intelligent juror is just as capable of coming to a correct conclusion in the premises as to the bearing of the facts as the expert himself, and it certainly seems as absurd to call for his (the expert's) opinion in such cases as is deemed to be the fact in respect to the ordinary witness. In my paper, to which I have alluded above (American Law Register, Sept. 1880), I say: "The discussion of the value of expert testimony frequently occupies the attention of the courts, and is made, in a large proportion of cases, the subject of adverse criticism on the part of the learned judges." This will continue to be the case so long as the statement of scientific facts and the *opinions* of scientific men are allowed to be received in the courts and are classified by them (under the same head) as expert testimony. Scientific testimony, that is, scientific facts, from the very nature of the case, must be admitted to be the very best class of testimony, while the opinions or guesses of scientific men, like all other guesses, are often as likely to be wrong as right. It would be just as reasonable to class under the same head the theories of the alchemists and the demonstrations of the chemists as to place *opinions* and the facts of science in a similar position.

The proverbial uncertainty of expert testimony is further due to the practice of the courts themselves in admitting incompetent persons to testify, as also in thus adopting an altogether incorrect classification.

If the courts deem it necessary, to the settling of disputed questions, to classify facts and opinions under the same head, that of "expert testimony," and to make use of both to the same end, they might do away with the present state of confusion in the matter, by calling the one the testimony of fact and the other the testimony of opinion.

As an illustration of the first species of testimony, I give a case in which it was a question, whether one part of a document was written with the same ink as the other part. Upon submitting

the paper to the action of water, in connection with the thin sheet used in the process of copying, I found that one part gave a distinct copy, while the other part showed not the slightest appearance of being acted upon by the solvent. Further, upon both parts being subjected at the same time to the action of a re-agent, in one case the ink was changed to green, while in the other it was obliterated. Was there any need in this case for the expert, who performed the manipulations, to give an opinion as to the identity of the ink in the two portions of the documents; and was not the jury just as competent to decide the question as the most skilled expert? And, further, could there be any propriety in designating the answer to such a question as an *opinion* at all? "An opinion," say the authorities, "is a matter about which two persons can, without absurdity, think differently." Could there be any chance of such difference here? And why then does the expert witness stand in any different relation to such cases as the one under consideration, than the ordinary witness? And, further, does not his being an expert, in the legitimate sense of the term, incapacitate him in many of the courts from giving testimony at all in such cases, that is, in cases where, as in the one under consideration, he is able to set the actual facts before the jury? He could not, as is evident, give an *opinion* in such a case, as the result of his investigation amounts to a demonstration.

Is this a strained interpretation of the practice of the courts as to the admission of expert testimony? In *Rex v. Cator*, 4 Esp. 117, the expert was allowed to be asked whether, in his opinion, the libel under consideration was written in a feigned or *natural* hand, but he could not be allowed to answer the question whether he should judge that the libel was written by the same person that wrote the acknowledged letters. Could absurdity go farther than this? What then is a natural hand in contradistinction to an unnatural or feigned hand as a general term? Or if the question read, Is this the handwriting of the party or parties involved in the transaction under consideration, how are we to get at the fact if we cannot be allowed to compare it with genuine specimens? In the case mentioned at the head of this paper, one of the government experts, Hagen, sought to make this distinction between a natural and feigned hand, and Mr. Southworth, another of the government witnesses, uses the term "natural hand." It would

be interesting to discover what is meant by "natural hand" in this connection. One of the definitions of the word "natural" is "produced by nature," "not artificial;" another, "in accordance with nature." Certainly this cannot be the meaning in either case, and we are precluded from limiting the application of the term to individual cases by the comparison of specimens of writing. This is forbidden in the first place, by the rulings of the court, and in the others by the connection in which the word "natural" is employed.

In *Gurney v. Langlands*, 5 B. & Ald. 330, on a charge of forgery, the expert was asked, "From your knowledge of handwriting, do you believe the handwriting in question to be genuine or forged?" The learned judge, Baron WOOD, said, in the course of his remarks, "There is no known standard by which handwriting can, upon inspection only, be determined to be counterfeited, without some previous knowledge of the genuine handwriting, the handwriting of men being as various as their faces."

In a case previous to this, Lord KENYON admitted this kind of testimony, *i. e.*, "Is the paper in question written in an imitated hand?"

In the subsequent case of *Goodtitle v. Braham*, 4 Term Rep. 497, he said, however, that he "would not receive such evidence." And he seems at this time to have come to a conclusion as to its utter absurdity; for he says in another case (*Batchelor v. Honeywood*, 2 Esp. 714), as to the evidence of a clerk from the post office, offered, under similar conditions, "it is *too loose* and cannot be received."

And Chief Justice BRONSON, of New York, in *Sackett v. Spencer*, 29 Barb. 180, adds, "The evidence of *experts* has been allowed in some instances to show that the signature was in a simulated hand; but this is now disapproved of." In spite of all this, and in spite of the manifest absurdity of the whole thing, in the Whittaker trial or trials, including the one at West Point, there were found experts, and "judge advocates," and "recorders," who could not only entertain such questions, but go even further, and allow an opinion to be given as to whether the specimen under investigation was written by a man or a woman.

Recorder SEARS to the expert, Mr. Gayler: "Can you say whether the anonymous letter (*i. e.* "the note of warning") was written by a man or woman?"

Ans. "In my opinion it was written by a man."

Q. "Is it a disguised hand?"

Ans. "I think so."

Thus it will be seen that in the eyes of these experts and gentlemen learned in the law, there is some known standard by which handwriting can, upon inspection, be determined to be counterfeited or otherwise, and, moreover, that this standard or model can be formulated in some way so as to be conceived of and understood as the true type or typical form of a natural or genuine handwriting. It would seem just as appropriate to talk of a natural brick house, or a natural steam-engine, as of a natural handwriting.

Perhaps, however, the idea may have been deduced from authority, that of Mr. Justice DOGBERRY, who declares that, "to write and read comes by nature." So that we may thus be warranted in pronouncing, in the language of the experts quoted above, whether a specimen of handwriting be "natural," or "feigned," or "simulated," or "dissimulated," or "disguised," or an "imitation," &c.

It will be seen that I am warranted in referring to this class of testimony as being still admitted in the practice of some of the courts, notwithstanding the declaration of Chief Justice BRONSON, that "it is now disapproved of," as the first case referred to, *Rex v. Cator*, is stated to be a leading case on this subject (5 Am. Law Rev. 228), and the present case, though tried by a military court, was conducted as regards the admission of evidence, in the same manner as it would be if tried in the civil courts.

I do not wish to pursue, to any great extent, the question as to how far a strict construction of the rules of the courts would debar the scientific witness from giving, as an expert, any other testimony than that of opinion. Certain it is that in my own experience in some of the courts, such testimony only has been admitted, while in others every step in the process by which I have arrived at my conclusions, has been deemed admissible as testimony, and not with the mere idea alone of thus testing the qualifications of the expert. With reference to the particular class of testimony under discussion, or rather to one species of it, that in regard to handwriting, no other idea seems formerly to have been entertained by the courts, than that the expert's testimony should be that of opinion only. Lord MANSFIELD, in *Folkes v. Chadd*, 8

Doug. 157, says, "Handwriting is proved every day by opinion." In all the cases to which I have alluded, and in all which I have thus far examined, this is the only idea which is entertained in regard to the character and grounds of admissibility of this kind of testimony. It is true that "It had been the constant custom of the courts before the time of *Folkes v. Chadd*, to receive instructions from skilled witnesses; and whether such witnesses gave their testimony in the form of general scientific facts, or merely as opinions which the jury were to receive as facts, no objection was ever made to its reception." But nowhere is it even intimated that handwriting was ever thought to be capable of proof under the first condition.

This declaration or opinion, although applied to an altogether different subject than the one under discussion, covers the whole ground, and had the courts followed the idea here formulated, and classified the two kinds of so-called expert testimony under two heads, as I have suggested, they would have avoided the "deplorable confusion" as, says the writer, before quoted, in which "the whole subject has become involved." And still further, they would have avoided the utter absurdity of their many contradictory utterances in regard to this class of testimony.

The writer of the article in the Law Review, before quoted, says: "The assistance of such persons" (those skilled in any art or science) "in the administration of justice is as imperative as ever, since it is simply impossible for ordinary men to decide upon questions of abstruse and recondite learning or of technical skill without the aid of *experts*."

On the same page he has quoted the maxim, *cuiuslibet in sua arte perito credendum est*. On this he comments by saying that this maxim "would seem natural and reasonable enough to be capable of direct and easy application, but experience has shown it to be one of the most difficult—producing the most deplorable confusion and conflict in that department of the law in which it is sought to be applied." And further, "the investigation of the adjudications and discussions upon the subject, reveals an unmistakable tendency on the part of eminent judges and jurists to attach less and less importance to testimony of this nature." And this last, notwithstanding the admitted fact that in many cases it is "absolutely impossible to get along at all without this class of testimony."

But after all, is it very certain that there is any inherent difficulty in the application of the principle in legal trials? Is it not rather obvious that the apparent confusion grows mainly, as I have indicated, out of an incorrect classification in the premises and also of a want of technical knowledge on the part of those called upon to administer the laws?

This may seem an unjustifiable arraignment of learned judges and lawyers; but what of the proof? Lord MANSFIELD says, "When questions come before me in regard to unskilfully navigating ships, I always send for the brethren of the Trinity House. The question depends upon the evidence of those who understand those things." Thus this eminent judge acknowledges his want of information upon this special subject.

In a case in which a party was charged with passing a counterfeit bank note, it became necessary, in order to establish the character of the note, to distinguish between an etching and an engraving. To this end an engraver was called as a witness in the case. To the unskilled observer, the distinction is not appreciable, and in case of a much-handled note, it would pass the ordinary observation of a practical engraver; but with proper and careful examination, he could not fail to come to a correct conclusion in the matter. In the present case, as the court and attorneys could see no difference as to the genuineness of the specimens under examination, the case went to the jury with this idea, that each must therefore be genuine. The judge remarked, almost in the language of Lord President BOYLE, which I have quoted in a former paper: "In this case, an engraver has been examined, to whose testimony I pay very little attention, as their *opinions* are but little to be depended upon." The counsel for the defence had previously called the attention of the court and jury to the fact that (in his own language) "no human eye could see any difference, and that therefore no such difference could exist. The alleged difference, he said, was subjective or wholly imaginary on the part of the so-called expert." And yet the note was a counterfeit, and the plate had been executed mainly by the etching process, while the genuine plate was largely an engraving.

Here it will be seen that the very terms used by the witness in giving his testimony were misunderstood by the court, so that the court designated said testimony as an *opinion*, which it was not in any respect. It was simply a statement of an absolute fact which

the witness well understood and knew to be such, and which constituted as essential a difference between the processes used in the production of the two plates as exists between that employed in making a cast and a wrought-iron structure. Here there is something added to the legal literature which, as we have seen above, declares that eminent judges and jurists do not place much confidence in expert testimony. The reason in this case at least, would seem to be very obvious. One other case I proceed to notice in connection with this part of my subject, as it still further serves to illustrate what I have already said as to the sweeping generalization of the courts, in respect to the class of testimony under discussion.

In the *Tracy Peerage Case*, 10 Clark & Fin. 154, 191, Lord CAMPBELL says: "I do not mean to throw any reflection on Sir Frederic Madden" (the expert in handwriting employed in the case), "I dare say he is a very respectable gentleman, and did not mean to give any evidence" (opinion) "that was untrue; but really, this confirms the opinion I have entertained, that hardly any weight is to be given to the evidence of what are called scientific witnesses." Is not this most excellent logic? Because, in the opinion of the judge, an expert in handwriting has given testimony (an opinion) which he, the judge, thinks is not to be relied upon, that, therefore, in his own language, this really confirms him in the opinions he has entertained, that hardly any weight is to be given to the evidence of scientific witnesses, *e. g.*, chemists, astronomers, physicians, &c. Would it not be for the best interests of the courts and, as a consequence, of society also, to adopt that portion of the motto of The London Royal Society, where it says: "Science will not accept the authority of any master, however illustrious he may have been." Judge McLEAN, in *Allen v. Hunter*, 6 McLean 303, says: "The opinions of the experts who have been examined, are in conflict, and so far as my experience goes, this has been uniformly the case where experts have been examined." In this case eight doctors deposed in favor of the plaintiff, and eleven for the defendant.

In volume 80 of the Reports of Cases at Law and in Chancery, determined in the Supreme Court of Illinois, the opinions affirm the judgments below in thirty-three cases and reverse them in sixty-six cases, thus disagreeing with the courts below in two-thirds of the cases under consideration. Nor does this, by any means, present

the whole of the facts in the premises. As cases in the Supreme Court are decided of course by a majority of the judges, it will be found in many of those alluded to that the court was divided in opinion as were the doctors in the case which furnished the occasion for the discriminating conclusion of Judge McLEAN in regard to every *species* of scientific testimony. For, as will be observed, the learned judge makes no exception in the case, but distinctly states that, as far as his experience goes, this has been uniformly the case when experts have been examined. This testimony of the doctors, it will be remembered, is, precisely of the same character as the decisions of the judges, *e. g.*, the testimony of opinion.

Suppose the doctors, together with other scientific witnesses, should quote Lord CAMPBELL's language and apply it after this manner: "We do not mean to throw any reflection upon the noble lord nor upon judges in general. We dare say that they are all very respectable gentlemen, and do not mean to give an opinion that is incorrect, but really this confirms the opinion we have entertained that hardly any weight is to be given to the opinions of lawyers or learned judges, especially as it regards matters belonging to their particular profession. And as to scientific testimony they come, in most cases, with a bias in their minds in regard to it, depending upon their want of technical knowledge in the premises. From this same want of special knowledge outside of their profession comes their absurd classification of expert testimony, in which all varieties are placed in the same category, so that when a seeming discrepancy occurs in one case they declare, *ex cathedra*, that *all* such testimony, that is the 'evidence of what are called scientific witnesses,' should have 'hardly any weight given to it.'"

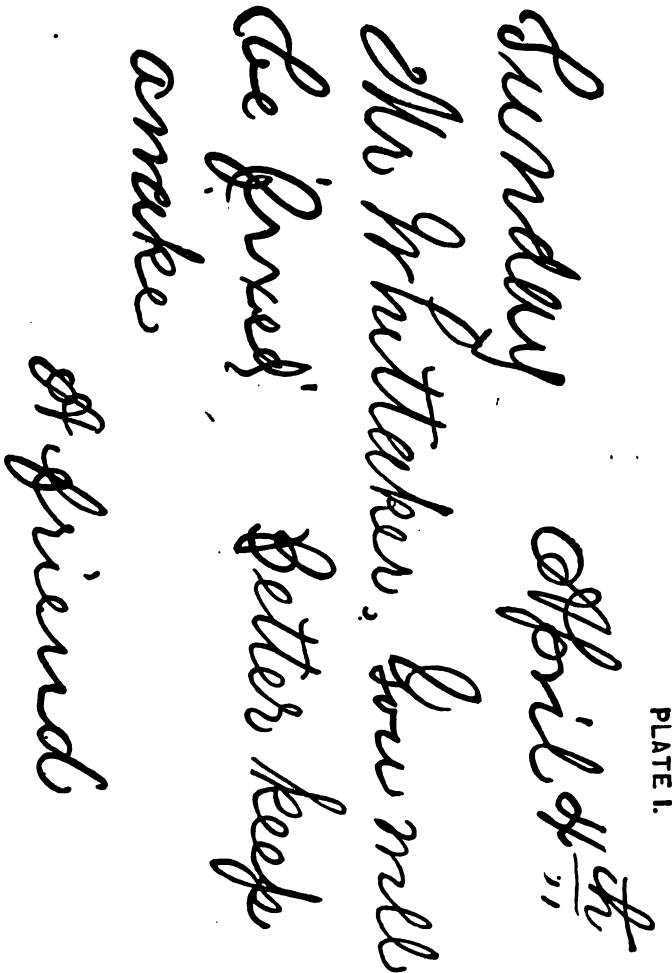
Or, in the language of Judge McLEAN, the scientific court might say, "The opinions of the judges of the law courts, in a considerable proportion of their cases, are in conflict, and so far as our own experience goes, this has been largely the fact where they have been called upon to decide cases belonging to their own profession even; hence their opinions are but little to be relied upon. And if this be the fact in their own profession, how much weight should be given to their opinions upon subjects with which they are totally unacquainted?" The argument, it seems to me, is as strong against the value of one species of testimony or opinion as

the other. And this lies in the case of scientific testimony against that of opinion only. But who does not realize that civilized society could not get along at all without the courts, and further, that their wide differences in opinion grow out of the very nature of the human mind and the infinity of human relations? It may be, and no doubt is, difficult for the courts to adopt rules in all cases by which to test the qualifications of experts, but they could do so, I think, where the processes by which a conclusion is arrived at are of such a nature as to be capable of presentation to an intelligent jury. And in these cases, as I have suggested before, it might be left to the jury to draw their own conclusions, as in cases of ordinary testimony.

In the examination of handwriting I have endeavored to adopt a method by which the ordinarily intelligent man may be able to come to a conclusion with no other assistance from the expert than that of a full explanation of the facts in the case. It consists in the bringing together of magnified specimens of the letters under discussion, drawn with great accuracy by means of the microscope, and placing the disputed letters and words thus enlarged by the side of the genuine ones, thus enabling any one to make a comparison of form under the only conditions in which such comparison can possibly be made. We are also able under these conditions to observe the minute anatomy of the letters which is inappreciable in most cases by the unaided eye. The only theory involved in the process is the idea that every person has some peculiarity in his writing unlike that of any one else which, if not otherwise appreciable, may be brought out by means of the microscope. This may consist in what has been called the "rhythm of pressure," where some portion or portions of a letter are specially shaded, or by a peculiar looping, curving of pen strokes, &c. Whatever the facts may be, they are all brought out by means of the microscope, and by thus placing the enlarged copies of the letters side by side the juror as well as the expert in a given case is placed in a position to draw his own conclusions. Where chemical or other so called scientific examinations are to be made, it is my endeavor, as before stated, to bring the facts in the same manner before the jury, thus placing them in a position to do their legitimate work in these cases as well.

My whole course of examination in the Whittaker case was conducted on this method alone, so that no conclusion was given

the grounds of which could not be made plain by ocular demonstration. This case, so far as I am concerned in it, consists of the question whether a certain document was written by Cadet Whittaker or by some other person.



Sunday April 4th
 Mr Whittaker, You will
 be 'fixed' Better keep
 awake
 A friend

PLATE I.

This document is called the "note of warning" (plate 1) and consists of the following words: "Sunday April 4th Mr Whittaker, You will be 'fixed' Better keep awake A friend" The envelope in the same hand is simply addressed "Cadet Whittaker." I give a fac simile of the first magnified four times,

power of from 9 to 10 diameters (80 to 100 areas), and then photographed on the wooden blocks, thus preserving the original form unchanged except as to size. I have drawn my report of the testimony given in the *first* trial from the Criminal Law Magazine of March 1881, and this, with whatever else of government testimony that is found in this paper, is given in order to illustrate not only what I consider the difference between true and false methods in such investigations, but also to show the utter absurdity and unfairness of much that is introduced as testimony in those cases in which experts are called to testify.

Expert John E. Hagen, Criminal Law Magazine, p. 158, says: "Effort is made by a nerve motion to vary the direction from an accustomed routine line of motion to a different one, and one to which the reflex capacities of the muscles guiding the pencil have not been habituated. The capital 'S' in Sunday shows the wandering pencil lines of disguising effort, as do the capital letter 'A' &c. Page 159, at the top of the 'C' in the word 'cadet' an unusual loop is formed by steady and arbitrary conditions of habit," &c. It would not seem difficult to estimate the value of the testimony of a witness who could make such a statement as this. What then is nerve motion? Are not all the voluntary motions of the body produced by the action of the muscles through the influence of the nerves under the order of the nerve centres? And what are "reflex capacities of muscles?" Do the muscles ever acquire capacities of their own by which they act independently of the nerve centres? There may be some excuse perhaps for unscientific persons coming to a conclusion that they do so in St. Vitus's dance, or epilepsy, but these would hardly be conditions in which any particular kind of writing could be produced. But even here such testimony would be of no value whatever, as it is founded upon false premises. Both diseased and normal muscular action depends for its direction upon the nerve centres. And thus all this material allowed to be used as testimony, on which the reputation, and life even, of an innocent person may depend, is shown to be as baseless as "the stuff of which dreams are made." Certainly then its admission in the courts becomes matter of grave question.

The loop at the top of the "C," which we are told is formed under such mysterious conditions, is shown on plates 2, 4, 5. The letters on the plates marked with a star are from the "note of



of Whittaker's, copied from Hagen's own plate, and represented as being made in the same manner in the expression "an unusual loop is formed at the top of the "C" in the word cadet." By looking at Hagen's own model (plate 5), and at these letters in plate 2, and the *diagram* "Cs." in plate 4 (the last five of which are all the forms of this letter which approximate in the least to those

under discussion, which I find in some eighty of Whittaker's papers in my possession), we shall see that they are made upon entirely different principles. In Hagen's example, from whence he has drawn his conclusions, it will be seen that the crossing lines would form *two* open loops at the upper part of the first letter had not the first loop been obliterated by the inflow of the ink, while in the other, from Whittaker's writing, *three* loops would have been seen as shown in the diagram. It will be also seen that the outline of the two letters is quite different, the one everywhere rounded, while the other shows a sharp point at the top.

Leaving out of view the part I will call the tail in the first letter, and which I have never found in any of Whittaker's "*Cs.*" let us follow this stroke of the pen from the point of crossing the downward shaft until its return to this point. In the first "*C,*" on plate 4, that from the "note of warning," this line passing to the right, forms the first loop of the "*C*" by turning upon itself downward, and to the left then upward, still continuing its course to the left, then downward again to the starting point. In Whittaker's "*C,*" the line first proceeds upward and to the right to a point in its course where it turns directly downward, forming a sharp corner; next it turns upon itself to the right and proceeds upward, and to the left crossing the two parts of the line which constitute the angular portion of the letter; next turning downward and to the left to the starting point. Thus, it will be seen, that there are three crossings and three loops in this letter, while there are but two in the first "*C,*" and in the formation of the first loop of the two letters the line is carried to the left in one and to the right in the other. Next, I notice the capital "*S,*" in plate 5. Of this letter it will be remembered Expert Hagen says: "It shows the wandering pencil lines of disguising effort." The first "*S,*" in plate 5, is from the "note of warning," the second "*S*" is one of Whittaker's; both copied from Expert Hagen's plate. The first shows the first limb as beginning at the right, then proceeding to the left, then again to the right with an upward curve and course until it crosses the shaft where it forms a downward curve. Next the line mounts upward to the top of the letter, where, turning abruptly on itself, it proceeds downward almost in a straight line, forming the upper loop of the letter. The next "*S*" (Whittaker's) begins at a point at the left, and proceeds to the right, and upward in a continuous curve until it reaches the top, from whence it proceeds downward,

PLATE 5.

P. P. P. P. C. C.
 W. W. G. G. G.
 Whittaker
 Whittaker
 Whittaker
 C. C. C. C. C. C.

forming a curve opposite to the first, thus constituting the upper loop of the letter, with two nearly equally curved sides unlike the first which has one side nearly straight. Notice also the first limb or upward stroke of the two letters, the one made up of double curves in opposite directions, the other of a single curve in one direction. The analysis of these letters might be carried much farther, but I shall give the prominent characteristics only, as these will fully serve my purpose. Where the original writing is

executed in ink, and with an ordinary pen, the minute anatomy of the pen strokes, the "rhythm of force," &c., often furnishes very important testimony, but when the pencil, or pencil-pointed pen is used, this "rhythm of force" cannot well be appreciated. The next two letters, on plate 5, from Expert Hagen's plate 1 (used at the court-martial) will be seen to differ quite widely from each other. The first from the "note of warning" has an oval-looped top, a *double* curved shaft, and a blunted terminal extremity, the other, from Whittaker's writing, is without a loop at the top, has a *single* curved shaft, and ends in a point. This pointed ending of this class of letters is true of all of Whittaker's writing so far as my experience goes. This fact is also shown in plate 3. The next two letters ("C") I have noticed before. The two capitals ("W") I shall not comment upon, only referring to plate 2 for all the forms of this letter that I have been able to find in Whittaker's writing. The next group of three "Y's," in plate 5, are copied from Hagen's (plate 1). The first is from the "note of warning," the other two from Whittaker's papers. The first has the top loop formed with one side much more curved than the other, with the bottom of the main limb quite pointed; this limb joined to the lower without a perceptible loop, and the lower loop made up with a single curve and two distinct angles. The second letter has the first loop made with two nearly equally curved sides, the bottom distinctly curved, as it is also in the third example, the main limb joined to the shaft in both cases with distinct loops, the lower loop being made up with two curves and a single sharp angle. Could difference farther go than is shown throughout this entire plate? The editor of a certain legal journal, in commenting upon the "note of warning," said: "It must be concluded to be Whittaker's from the almost entire difference which exists between the two hands." This would seem to be the ground upon which the experts and the author of the article in *The Criminal Law Magazine* come to their conclusions in the case.

"Credo quia impossibile est."

Chicago.

R. U. PIPER.

(To be continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of Iowa.

HALLAM v. THE INDIANOLA HOTEL CO. ET AL.

A director of a corporation may become its creditor, and take and enforce a mortgage on its property, but he is not thereby divested of his responsibility as a director, nor the duties which as such he owes to the corporation, and he is bound to act in the utmost good faith throughout the transaction.

Facts considered upon which it was held that a sale of property of a corporation, under a mortgage held by one of its directors, should be set aside.

APPEAL from Warren District Court.

The defendant E. W. Perry, and the defendant J. E. Lucas, each obtained a decree of foreclosure of a real estate mortgage against the defendant, the Indianola Hotel Co., a corporation duly incorporated under the laws of Iowa. An execution sale was made thereon, and the property was purchased by Perry for the amount of both decrees and interest and costs, and the property is now held by him for himself and Lucas. The plaintiff Hallam is a stockholder in the hotel company, and he brings this action to set aside the sale, and the decrees, and the mortgages upon which the decrees were rendered. The alleged ground of the action is that the mortgages were invalid, and that the decrees were obtained by fraud, and that the purchase by Perry at the foreclosure sale should be set aside because Perry is one of the directors of the company. The court dismissed the plaintiff's petition and he appeals.

Cole & Cole and H. McNeil, for appellant.

Todhunter & Hartman, Henderson & Berry and Seevers & Sampson, for appellees.

ADAMS, C. J.—One of the mortgages is exceedingly informal, and neither appears to have been executed by the authority of the board of directors of the defendant company. If, therefore, the foreclosure of the mortgages had been resisted by the company, it seems doubtful to us whether the decrees thereon could properly have been obtained. But having been obtained, they constitute an adjudication, and are binding upon the company unless they were obtained by fraud. It appears to us also that if the com-

pany is bound by them, all the stockholders are bound by them, including the plaintiff. His interest in the litigation was represented by the company, and he was not only not a necessary party, but not a proper party.

Coming to the question as to whether there was any fraud practised in obtaining the decrees, we have to say that we think that there was not. The amount for which the decrees were rendered was due from the company, and had become payable. The complaint seems to be that these creditors combined with the officers of the company and were allowed to take decrees of foreclosure, whereas they should have granted an extension, or the company should have borrowed money and paid them off. The objection is not to the mode of foreclosure, so far as obtaining the decrees is concerned, but to the fact of foreclosure. But it is not for us to say that the creditors should have granted an extension, or that the company should have borrowed money and paid them and thereby prevented a foreclosure. If we should conclude that the affairs of the company were very unwisely managed, and that the foreclosures might have been prevented, such conclusion would fall short of justifying us in holding that the decrees were obtained by fraud.

Nor do we think that the fact that Perry was a director of the company necessarily precluded him from making a valid purchase at the foreclosure sale. His right to become a creditor of the company by loaning it money cannot be questioned for a moment. It was equally his right to take security and enforce it, and it seems to follow that he should be allowed for his just protection to bid at an execution sale of the property upon which he was secured. That a director of a corporation may bid at an execution sale made to pay a debt due the director from the corporation was expressly held in *Twin Lick Oil Co. v. Morbury*, 91 U. S. 587.

While this is so, it is not to be denied that a fiduciary relation exists, and a director cannot wholly divest himself of his responsibility to the company even in the very matter in which he has become an adversary. In *Twin Lick Oil Co. v. Morbury*, above cited, the court said "that a director of a joint stock corporation sustains one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, are viewed with jealousy by the courts and may be set aside on slight grounds, and

is a doctrine founded on the soundest morality, and has received the clearest recognition in this court and in others." Citing *Koehler v. Black River Falls Iron Co.*, 2 Black 715; *Drury v. Cross*, 7 Wall. 299; *Luxemburg Railroad Co. v. Moguay*, 25 Beav. 586; *The Cumberland Co. v. Sherman*, 30 Barb. 553. While, therefore, it was held that the creditor director was at liberty to bid at the execution sale, yet it was said that the liberty should be exercised subject to the rules which belong to his peculiar position. Under the doctrine enunciated, we are called upon to look into the acts of Perry with far greater scrutiny than we should be if he sustained no relation to the company other than that of creditor, and would be justified, we think, in setting aside the sale upon much slighter ground.

The defendant company was incorporated for the purpose of building a hotel. The indebtedness in question was incurred as a part of its cost. But it was a comparatively small part, amounting at the time of sale to but little more than \$4000, and in that sum was included considerable accrued interest. The cost of the hotel appears to have been about \$19,000. By the execution sale in question, the whole property has been exhausted to pay the comparatively small balance of cost of construction. The enterprise has certainly come to a very remarkable result.

Again, the evidence shows that the hotel was at the time of the execution sale rented at \$900 a year. It also shows, we think, that it was worth not less than \$10,000. That it was allowed to be sold upon execution and was not redeemed, nor the right of redemption sold, but a sheriff's deed allowed to issue, while not sufficient to establish fraud, is sufficient to excite suspicion and give some support to the claim strenuously insisted upon by the plaintiff, and of which we think there was some slight evidence at least, that there was a concert of action between Perry and the other officers of the company looking to the attainment of the result which has been reached. Now Perry was charged with the duty, as much as any other director was, of making a reasonable effort to prevent this result. It follows that, our minds being affected with suspicion that such effort was not made, we cannot say that the sale to Perry ought to be allowed to stand. We think that the sale should be set aside and the case remanded; that an account should be taken of the rents and profits received by Perry and Lucas, if any; that the judgment in their favor should be reduced by what-

ever amounts they are properly chargeable with, less proper expenditures, and an execution issue for the balance and the property resold.

Reversed.

A director may sell his corporation goods on credit. He may lend it money, endorse its paper, or in any manner become surety for it. "We have never heard it questioned," says WALKER, C. J., speaking for the Supreme Court of Illinois, in *Harts v. Brown, infra*, "that a director or stockholder may trade with, borrow from or loan money to the company of which he is a member." The question is, When directors of a corporation have become its creditors, what are their rights and duties? At least one of the authorities in point upon this question is an instance of railway "wrecking." A review of the cases will be interesting.

Four directors of a railway company endorsed its notes to B. & Co. for \$21,000, secured by \$42,000, in mortgage bonds of the road. The company became insolvent. B. & Co. were unwilling to trust to the mortgage and bonds for security and sued the four directors on their endorsements. They in turn entered upon the foreclosure of the mortgage, basing their foreclosure upon the \$42,000 and certain other bonds of the road held by the city of Milwaukee. A decree of foreclosure was rendered and a master ordered to take an account.

Just prior to this the four directors sought for some one who would purchase B. & Co.'s claims and rely entirely upon the mortgage for payment. They found C. & Co., with whom they made this arrangement: There were deposited with J. & Co. \$280,000 in bonds similar to the \$42,000 already mentioned. These bonds had never been, and were not to be, issued until B. & Co.'s debt was paid and twenty-seven miles of road built. In fact but five miles were built.

It was arranged to deliver this \$280,000 in bonds to B. & Co., and the four directors, constituting a quorum of the board, passed a resolution so to deliver them. Then B. & Co. were to deliver their notes and the judgments thereon, together with the \$42,000 and \$280,000—in all \$322,000—collateral bonds to C. & Co. They did so, C. & Co. paying B. & Co. \$13,330.20 for them. C. & Co., in order as they said to become absolute owners of them, then sold the \$322,000 in bonds on the Milwaukee Exchange and became themselves the purchasers for a small sum. Then they appeared before the master as creditors of the road upon \$322,000 in its bonds. He allowed these bonds as a lien upon the road, and upon them and no others was a final decree of sale rendered in the foreclosure suit. The entire railroad, its franchises, rolling stock (two locomotives and tenders, and with ten platform cars) and fixtures, in all worth nearly \$75,000, were then sold to C. & Co. for \$20,100. The other creditors were left unpaid, and D. & Co., to whom over \$20,000 were due for locomotives, filed a bill to reach the property in the hands of C. & Co. The court set aside the sale as fraudulent, and decreed an accounting by C. & Co.

Said Mr. Justice DAVIS: "We do not deny that a debtor has a legal right to prefer one creditor over another when the transaction is *bona fide*; but this is in no just sense a case of preference between creditors. If the law permits the debtor in failing circumstances to make a choice of the persons he will pay, it denies him the right in doing it to contrive that the unpreferred creditor shall never be paid. In other words, the law

condemns any plan in the disposition of property which necessarily accomplishes a fraudulent result."

B. & Co., preferring not to enforce the mortgage lien, only consented that it should be done on their being indemnified against costs. The court admitted that the directors had an undoubted right to indemnify B. & Co. It was admitted also that if B. & Co. insisted upon suing the directors personally they had as undoubted a right to secure some one who would purchase B. & Co.'s claims and collect them by foreclosure of the mortgage. "But," says Mr. Justice DAVIS, "their (the directors) departure from right conduct commenced at this point. Notwithstanding they had control of the foreclosure-suit, they were not content to let it proceed to decree and sale without they were in advance relieved of personal responsibility;" and in order to induce C. & Co. so to relieve them, they swelled the indebtedness of the company beyond its true amount by issuing without authority \$280,000 bonds and became participants and tools in a collusive and fraudulent sale and sacrifice of the whole of the company's property. As to creditors and stockholders, it was the duty of the directors to keep down the indebtedness of the company and preserve its assets, so that the former might be paid their just dues, and the latter protected from personal liability for demands possibly payable, by honest management, out of the company's property. They very clearly violated their fiduciary duties, and their conduct was thoroughly selfish, illegal and discreditable: *Drury v. Cross*, 7 Wall. 302.

In another case the stockholders instructed the directors to effect as large a loan as they could for the company, and to secure it by mortgage on its lands and works. Certain of the directors, who were also creditors, called a meeting, omitting to notify the regular secretary to attend. "As he was a large

creditor," say the court, "and was not to be favored, it is barely possible that the directors thought his presence would be embarrassing." One of the directors was appointed secretary *pro tempore*. The company's note and mortgage was then given to K. and B. for \$15,000, in consideration of which they were to advance the company \$1200 in money, let it have \$800 worth of provisions, and pay the debts owing from the company to the directors constituting the meeting. Subsequently a large interest in the mortgage was assigned to two of those directors, and they filed a bill to foreclose. The stockholders resisted, and the mortgage was declared fraudulent and void: *Koehler v. Black R. F. I. Co.*, 2 Black 715.

In *Coons v. Tome*, 9 Fed. Rep. 532, the board of directors of an insolvent corporation confessed a judgment against the corporation in favor of one of their number, who was also the president of the corporation and principal stockholder, with a view of giving him priority of lien over another creditor, who was about to obtain a judgment in a judicial proceeding. It was decided that such a preference could not be upheld, but that the two judgments must stand on a footing of equality in respect to the commencement of the lien, and share *pro rata* in the proceeds of the property available for their payment. The court said: "The directors of a corporation stand in confidential relation to its creditors, towards whom they are bound to act with perfect fairness. They are, at least, *quasi* trustees for the creditors; and where the corporation is insolvent, good faith forbids that the directors should use their position to save themselves, or one of their number, at the expense of other creditors."

In *Bennett's Case*, 18 Beav. 339, A., a creditor of a mining company, was the father of two of its directors, B. and C., one of whom was also a creditor of the company. The consent

of the directors was a necessary prerequisite to any transfer of the company's stock by the holders. It was embarrassed and some of the shareholders were dissatisfied, and desired to sell their shares, but B. and C., having control of the board of directors, refused to permit them to transfer their stock, unless a sum of money, largely in excess of calls due from them and unpaid, was advanced by the dissatisfied shareholders to be applied upon the claims of the director, B., and his father, A. The money was paid and so applied, A. and B. releasing the retiring shareholders from all liability in respect of their claims. It was admitted that if this money had been paid in good faith, in a manner most for the benefit of the company, the transaction could be sustained. But the court decided that the essence of the transaction being that a benefit should be obtained by a director and his family, and it being manifest that the transaction itself could not have taken place without the directors' sanction, it could not stand; and the retiring shareholders, on the company being wound up, were placed in the list of contributories.

In New Hampshire a court of equity decided that the directors of an insurance company could not legally apply its funds to the payment of losses for which they were individually responsible in preference to others: *Richards v. N. H. Ins. Co.*, 43 N. H. 263.

In *Jackson v. Ludeling*, 21 Wall. 616, the Vicksburg, Shreveport and Texas Railroad Company owned property worth more than two millions. It owed about three-quarters of a million in mortgage bonds, on which, being embarrassed, it was unable to meet the accrued interest. Pursuant to resolutions of the stockholders the directors appointed the president to arrange to sell the road to any other company who could put it in repair, complete it "and pay the debts of the company." One

Gordon conceived a scheme of forcing a sale under the mortgage, there being, as he represented, "a probability of a very decided speculation from the sale." He purchased for \$640 four of the company's \$1000 mortgage bonds, on which \$720 interest was due and unpaid. Without notice to any other bondholders he applied to a court and obtained an *ex parte* order for a sale of the road under the mortgage. Then Ludeling and several of the directors, who had combined to buy out the company, associated with Gordon. Meanwhile other bondholders met and commissioned one Horne to go to Monroe, where the Gordon party were operating, to have the road sold, and purchased by trustees to be selected by the bondholders and other creditors of the company. They further proposed a plan to adjust the indebtedness of the old company and to organize a new one. At New Orleans Horne met Gordon, and for the first time learned of the proceedings to sell the road. He went to Monroe and sought to postpone the sale, but failed, and was persuaded "for himself and his friends" to become one of the Gordon party. That combination appointed appraisers, who valued the property at \$75,000. It was then put up for sale, the sheriff imposing this condition upon purchasers: That whoever purchased should then and there cash any interest coupons due and unpaid which might be presented. The first bid was Branner & Co.'s, who offered \$550,000 for the property. "Then ensued," says Mr. Justice STRONG, "what we must regard as a most remarkable effort to prevent an adjudication to these bidders and an acceptance by the sheriff of their bid. Ludeling, for himself and his associates, and acting as their chief agent, presented one hundred and fifty-four of the mortgage bonds, four of which were Gordon's, one Bry's (an officer of the road) and most, if not all, the remainder obtained from Horne, and demanded

immediate payment of the past due coupons. He had no right to make such a demand. He knew the bonds had been placed in Horne's hand for other purposes. He knew that it was a breach of faith in Horne to allow them to be thus used, and a fraud upon their owners thus to use them. Stubbs (an associate of Ludeling and Gordon) presented seventy-two coupons taken from other bonds, and also demanded immediate payment. And he had no authority to make such use of those coupons. They had been placed in his hands for another purpose, which failed, and their owners had directed them to be returned. Bry also had one bond, and he presented it with its coupons. This one bond, with the four of Gordon, were all that there was any authority to present. Yet the confederates, taking advantage of Horne's breach of trust, and of Stubbs's unauthorized act, were enabled to present the coupons of one hundred and fifty-four bonds and part of the coupons of thirty-six other bonds for immediate payment. The sheriff joined in the demand, and, because Branner & Co. were unable at once to pay this unauthorized claim, he set up the property again immediately for sale, when it was struck off on Ludeling's bid of \$50,000 to the persons we have named (the confederacy). This was on Saturday, late in the afternoon, and on Monday next following the sheriff's deed was delivered, but the bidders, though receipting in part to each other, have still in their hands the whole of their bid except \$468.75, the amount of costs paid to the sheriff."

Upon these facts the court, at the suit of six hundred and sixty of the bondholders, set aside the sale, declared the mortgage still a lien, appointed a receiver, and decreed other necessary relief. Commenting upon such of the directors as were associates of Gordon, among whom were some that were bonding creditors, the court, by Mr.

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Justice STRONG, says: "They had no right to join hands with Gordon. They had no right to enter into or participate in a combination, the object of which was to divest the company of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. They had no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. Such a course was forbidden by their relation to the company. It was their duty to the extent of their power, to secure for all those whose interests were in their charge the highest possible price for the property which could be obtained for it at the sheriff's sale. They could not rightfully place themselves in a position in which their interests became adverse to those of either the stockholders or bondholders."

This case has been alluded to as an instance of railway "wrecking." Such instances are not uncommon. Equity will, at the suit of any, however small, minority of defrauded stock or bondholders, set aside such transactions: *Menier v. Hooper Telegraph Works*, L. R., 9 Ch. 350; *Salomons v. Lang*, 12 Beav. 339; *Gregory v. Fitchett*, 33 Id. 595; *In re Bank of Gibraltar*, L. R., 1 Ch. 68; *Robinson v. Smith*, 3 Paige 222; *Percy v. Millaudon*, 8 Mart. N. S. 68; *Peabody v. Flint*, 6 Allen 52; *Dodge v. Woolsey*, 18 How. 331; *Brown v. Vandyke*, 8 N. J. Eq. 795; *Kennebec, &c., Railroad Co. v. Portland, &c., Railroad Co.*, 54 Me. 173; *Colquitt v. Howard*, 11 Ga. 556; *Forbes v. Whitlock*, 3 Edw. Ch. 446; *Greaves v. Gouge*, 69 N. Y. 154; *Butts v. Wood*, 37 Id. 317; *Hazard v. Durant*, 11 R. I. 195.

In *Ex parte Larking*, L. R., 4 Ch. Div. 566, Larking had been a director. His company became bankrupt, and with knowledge of this he resigned. Subsequently he purchased 2000*l.* in its depreciated debentures, paying therefor 567*l.* Then he appeared in bankruptcy,

and as a creditor sought to prove up these debentures against the company as a debt of 2000/. and interest thereon. The claim was disallowed, except for the sum [567/.] actually paid. *MALINS*, V. C., saying: " * * * No trustee, who buys up an encumbrance upon an estate of which he is trustee, can ever against the trust estate make a profit, and never can recover against the *cestui que trust* more than the price he gave for it. If a man, who is a trustee of an estate, buys up a mortgage upon it at 20 per cent., he can only get the 20 per cent. with interest upon what he paid. Here is a man, a director of a company, who is a trustee. He has all the obligations of a trustee to perform. Here is a case in which he knows the company is insolvent at the time—that it had actually come to a disastrous end when he bought these debentures, and on that principle alone he cannot make a profit by his trusteeship." See, also, *C. C. & I. Co. v. Parish*, 42 Md. 598.

As to what directors who are creditors may do to secure payment of their dues, the case of *Smith v. Lansing*, 22 N. Y. 520, is interesting. To secure certain deposits a bank gave bonds, Lansing, its president, becoming, with others, sureties thereon. Lansing was the general managing agent and financial officer of the bank. It had no board of directors. "He occupied, therefore, the place, and possessed all the powers, of * * * directors * * * . It is proper, therefore, to consider the questions presented in the same light as if there had been a regular board of directors, and the acts done by the defendant [Lansing], had been done in pursuance of resolutions of * * * directors * * * ." [Per *WELLES*, J.] Subsequently certain property was sold to pay claims due the bank on mortgages. Lansing purchased this property, paying for it with funds of the bank, but taking the title in his own name. At this time

the bank was entirely solvent. Later it became insolvent, and a receiver was appointed who sought to compel Lansing to convey the property to him for the benefit of creditors. Lansing, in defence, claimed to hold the property as security for the money he and his co-sureties had paid for the bank, or were liable to pay for it, on the deposit bonds, and it was decided that he could hold the lands as such security. Considerable stress was laid by the court upon the good faith of the transactions and the solvency of the bank at the time they took place. These were admitted, and the case appears to have been considered analogous to that of a debtor who, while solvent, and with more assets than indebtedness, transfers a portion of his surplus property to his friends, family or creditors.

Another interesting case is that of *Harts v. Brown*, 77 Ill. 226. The Lincoln Coal Company contracted debts to nearly \$33,000, and also issued bonds to one Musick, who appears to have been a director, for \$9400, executing a trust-deed of its property to him to secure them. The company became involved, its property was sold under a mechanic's lien for \$2000, its bonds matured, payment thereof was demanded, and an extension refused unless personal security was given. A stockholders' meeting was called, and measures were taken by, among others, the directors, to form a new company, the proposers thereof agreeing to purchase from Musick his stock, bonds and claims against the company, and to pay him therefor with their notes secured by mortgage on their interest in the coal company's property. He agreed to make a sale under the trust-deed for their benefit. This sale was made, one Frorer becoming purchaser, paying the amount of the indebtedness of the company, and buying for the use of all stockholders who should join in the new company, the proposers of which also

purchased the certificate of sale under the mechanic's lien. The new company was then organized, and the property thus purchased worked with good profits and dividends. Then Musick and others of the stockholders filed bills to set aside the sale and have the property restored to the old company. The court decided: That the directors had power to borrow money of one of their number, and to execute to him a mortgage on the corporate property. That the debt could be collected by a sale of property to raise a sum sufficient to pay it. That the directors and other promoters of the new company had the right to purchase Musick's bonds, stock and claims, and also the certificate of purchase given at the mechanic's lien sale. "If the company," says WALKER, C. J., "had possessed money or property or any assets that could be converted into money with which to redeem and discharge the debts, then these purchases would have been in bad faith; but there were no such means, the company was hopelessly insolvent, and its final dissolution was at hand. The stockholders had been called together and they were urged to make advances in proportion to the stock they severally held, and thus relieve the company and preserve its existence, but this they refused to do; and as it could not be preserved, and must come to an end by a sale under the power in the trust-deed, no reason is perceived why appellants [directors and other promoters] might not become the purchasers at the sale."

To the point that, more property having been sold than was sufficient to pay the bonded indebtedness of the company, the sale was excessive, the court replied that only \$70 more than such indebtedness was bidden for the land, shaft, railroad tracks and mining rights, and that the remaining property was but mere chattels, valueless except for use in connection with the mine. "When the company," say the court,

"had been reduced to this situation, what was the plain, moral and legal duty of the directors? Surely, every person would without hesitation, say, sell the remainder of the property and pay the debts of the company."

As to whether the directors could become purchasers at their own sale, the court said: "Until the bonded debts were satisfied, the sale was that of Musick for the benefit of the holders of the bonds," all of which were not owned by directors. "But when the sale amounted to a sufficient sum for that purpose, all that was subsequently sold was by Musick as auctioneer of appellants [directors], and they purchased at their own sale. This they could not do, any more than they could fix a price on the property and appropriate it to their own use, which the law has never sanctioned with persons occupying the relation they did to stockholders. The sale, then, of property over and above what was necessary to pay the bonded indebtedness, was void, inasmuch as it was purchased by the directors of the company:" *Harts v. Brown, supra*.

Finally, directors may, in any of the usual ways, become creditors of their corporations. But if they buy up depreciated claims against it after its insolvency, they are creditors, not for the face value of such claims, but for the sum they actually pay for them. As creditors they cannot prefer themselves, either by actual preferential payments of corporate funds, or by mortgage or other transfer, direct or indirect, of the corporate property to themselves. Perhaps an exception exists as to the surplus property or funds of a solvent company which may, it appears, be set aside to pay or secure a director or one occupying his position.

Nor can directors, by refusal to permit a transfer of shares, or by any other sort of duress which their position as directors gives them power to exercise,

compel payments to be made on their claims in preference to others. Especially have directors, whether creditors or not, no right to enter into any scheme for a collusive sale and sacrifice of their

company's property. And all their proceedings as parties to any combination or "ring" for such purposes, will be set aside in equity.

ADELBERT HAMILTON.

Chicago.

Circuit Court, Eastern District of Pennsylvania.

HUBBELL v. DREXEL.

The pledgee of shares of stock, in the absence of a specific agreement to the contrary, is entitled to have the shares transferred to his own name on the books of the company, and where such transfer is made he is not bound to retain the identical shares pledged, so long as he keeps on hand an equal number of similar shares to answer the pledgor's demand on repayment of the loan.

A share of stock is without ear-marks, and undistinguishable from the other shares of the same corporation and issue, the certificates bearing dates and numbers, being but evidence of title.

BILL in equity filed in December 1880, by W. W. Hubbell against Drexel & Co, to compel the transfer to the plaintiff of 1702 shares of Pennsylvania Railroad stock.

The case was heard upon bill, answer and proofs, from which it appeared that at different times between March 14th and July 17th 1877, plaintiff had deposited with defendants various shares of Pennsylvania Railroad stock as collateral security for loans; that on said date a settlement was had by which it appeared that the number of plaintiff's shares so held by defendants was 1602; that on the same day plaintiff executed to defendants a demand note for the amount of the loans, with condition that upon default the holder might sell the collaterals without further notice, at public or private sale.

It also appeared that shortly after the settlement of July 17th 1877, the market-value of the stock having declined, the defendants called upon the plaintiff for additional margin, and he being unable to furnish it, the defendants, with his consent, sold 600 shares out of the collateral they held. The stock left by the plaintiff with the defendants as collateral was immediately thereafter transferred into their name, and new certificates issued to them.

In September 1877, it appeared from the testimony that these particular certificates were transferred out of the name of Drexel

& Co. into that of sundry other parties; but by the evidence offered by the defendants, it appeared that this transfer was made simply for convenience in the deliveries, and that the defendants always had on hand a much greater number of shares, out of which they could have returned to Mr. Hubbell his shares upon the repayment of his loan.

In April 1878, the defendants having notified the plaintiff to pay his note, upon his default, after due notice, sold the remaining shares at public auction at an average price of 28½. After crediting the plaintiff with the proceeds of this sale, there remained an indebtedness due the defendants of \$1600.

Plaintiff alleged that in the settlement of July 17th, defendants had failed to account for 100 of the shares, and that defendants had agreed not to enforce the condition of the note, but to carry the stock for plaintiff. Plaintiff further charged that the transfer of the stock by defendants to their own names before default, and their failure to retain in their possession the identical shares pledged was a fraud on plaintiff's rights.

W. W. Hubbell, for plaintiff.

Samuel Dickson, for defendants.

The opinion of the court was delivered by

BUTLER, J.—(After discussing the questions of fact as to the error in the settlement and the agreement to carry the stock, and deciding them in favor of defendants.) The allegation that the defendants procured a transfer of part of the stock to themselves, on the books of the company, immediately on receiving the certificates from him, is immaterial. It was plainly their right to do so. If he desired to avoid this he should have contracted accordingly. When thus transferred, it was unnecessary and impossible to distinguish between these shares and others held by the defendants. It is of no consequence, therefore, that in selling stock they may have disposed of these particular shares. They at all times had in hand an amount greatly in excess of the shares received from the plaintiff, and were therefore constantly prepared to keep their contract with him. A share of stock is without "ear-marks," and cannot therefore be distinguished, as has just been said, from others of the same corporation and issue. The certificates, bearing dates and numbers, are but evidence of title. On payment of his

debt the plaintiff would have been entitled to a return of the number of shares which the defendants had received—nothing more. Such was the effect of his contract: *Nourse v. Prime*, 4 Johns. Ch. Rep. 490; *Allen v. Dykers*, 3 Hill 593; *Gilpin v. Howell*, 5 Barr 41.

For these reasons the bill must be dismissed, with costs.

McKENNAN, J., concurred.

A question of considerable practical importance was decided in the principal case, namely: that the pledgee of shares of stock, in the absence of a specific agreement to the contrary, may transfer the stock to his own name on the books of the company, and when so transferred, the particular shares become undistinguishable from the common mass, and the pledger is not entitled to the return of the identical shares pledged.

This decision was grounded upon the fact that shares of stock are without any ear-mark, and consequently cannot be distinguished from other like shares of the same corporation; it being of no consequence that each certificate may have a different date or number, since the certificate is only the evidence of title.

The decision, which is no doubt perfectly correct, was probably based upon the remarks of BELL, J., in *Gilpin v. Howell*, 5 Penn. St. 41. In that case the judge in the court below charged the jury, that the plaintiff could recover, if the defendants, the holders of stock of the Girard Bank as collateral security from the plaintiff, had either parted with the Girard Bank stock pledged to them or thrown it undistinguished into the general mass of their own stock, or that of other persons in their custody, so as to be unable to discriminate the identical shares of stock originally purchased for the plaintiff. "It is, in general, true," said BELL, J., on appeal, "that where the pledge is distinctive in its character, and therefore capable of being recognised among other things of a like nature, or

where a mark is set upon it with a view to its discrimination, the pledgee is bound to redeliver the identical article pledged, and cannot substitute something of a like kind unless so authorized by the contract. But I think there is a manifest difference *ex necessitate*, where the thing pledged, from its very nature, is incapable, in itself, of identification, if once mingled with other things of the same kind. In such case, it is the duty of the pledger to put a mark upon it by which it may be distinguished; for, as is said in *Nourse v. Prime et al.*, 4 Johns. Ch. 490, if a person will suffer his property to go into a common mass without making some provision for its identification, he has no right to ask more than that the quantity he put in should always be there and ready for him. By a just fiction of law, that *residuum* shall be presumed to be the portion he put in. The good sense of these remarks made in immediate reference to a pledge of shares of bank stock, recommend them to our adoption. They are repeated by Chancellor KENT in the s. c., reported in 7 Johns. Ch. 69, and noticed with approbation by NELSON, C. J., in *Allen v. Dykers*, 3 Hill (N. Y.) 593. Speaking of *Nourse v. Prime*, he says, 'as it appeared the defendants always had on hand the requisite quantity of shares, the law will presume the shares so on hand, from time to time, were the shares deposited, because the parties have not reduced the shares to any more certainty.' It may be, that even in a pledge of stock which frequently passes from hand to hand with almost as little ear-mark as money itself,

the pledger may identify and stipulate for a return of the very same stock, by handing his certificate to the pledgee with a blank power to transfer, not to be used except on a failure to redeem or in some other mode devised for the same purpose. But where, as here, the shares pledged never stood in the name of the pledger, but passed at once from the former owner to the pledgee, without anything done by the former to set them apart from other like shares of the latter or even a request to this effect, it is not perceived how, with any show of reason, it can be made the subject of complaint, that the pledge necessarily was mingled with the other similar stock of the pawnee. * * * As already intimated, under the circumstances of this case, nothing further was incumbent on the defendants than to have at all times under their control the requisite number of shares ready to be transferred to the plaintiff when legally demanded, unless, indeed, it was the agreement and understanding of the parties, that the defendants, until the money borrowed was repaid, should deal with the pledged stock as if it was their own. In such case it would be within the power of the pledgees to sell or otherwise dispose of it pending the loan."

In *Neiler v. Kelley*, 69 Penn. St. 409, in an action of trover by the pledger of stock to recover for a wrongful conversion by the pledgees in selling the same without notice to the pledger, the debt being due and unpaid, SHARSWOOD, J., said: "The defendants below were at no time under any obligation to deliver these stocks and bonds specifically to the plaintiff. He never had put himself in a position to demand them before the bringing the suit, or up to the time of trial, by tendering or offering to pay the amount of his indebtedness to the defendants. Had the action been detinue or replevin, he must have failed entirely. * * * Where a plaintiff seeks to fasten a responsibility for more than the usual

measure of damages, he must also fasten upon the defendants the duty or obligation to deliver *specifically* the stock or securities at some particular time, and their refusal to fulfil that duty. *Non constat*, that upon a demand and tender, the defendants would not have been able to deliver to the plaintiff similar stocks and securities, as, according to *Gilpin v. Howell*," *supra*.

In Nevada in *Boylan v. Huguet*, 8 Nev. 345, the same rule was laid down, the court holding that, in the ordinary transactions between principals and brokers, the former were not entitled to receive the identical shares purchased on their account by the brokers, and that the brokers were acting within the terms of their contracts with their principals, so long as they were ready to deliver, on demand and payment, certificates representing the requisite number of shares. WHITMAN, J., said: "So long as he (the broker) held a certificate or certificates representing the requisite number of shares and was prepared to deliver them, on payment and demand, so long was he within the terms of his contract; and though he might have used and reused the identical certificates received on filling Boylan's (the principal's) orders, mixed them with others, destroyed them even, there was no conversion until he, or as in this case, his voluntary assignees, refused to deliver upon demand." See also the charge of the court in the case of *Fay v. Gray*, 124 Mass. 500.

The American authorities thus seem to be harmonious. There is a case, however, decided in England which, at the first blush, might seem to be authority for a different rule.

In *Langton v. Waite*, L. R., 6 Eq. C. 165, A. & B., stockbrokers, borrowed, on behalf of the plaintiff, a sum of money for a term of three months from the defendants, also stockbrokers, upon the security of certain shares of stock, which were transferred to the

name of one of the defendant's firm. Before the end of the term, the plaintiff, having contracted to sell the stock, applied to the defendants for a retransfer of it, tendering the amount of the debt in full with interest. The defendants, having sold the stock, refused to return it or *similar shares*, alleging that the loan was made for the full term, and the plaintiff in consequence of the refusal of the defendants, was obliged to go into the market and buy other shares, at a loss to himself, to complete his contract of sale. At the expiration of the term, the defendants, having bought other similar shares at a lower figure, tendered the amount of the security to the plaintiff. A rule of the Stock Exchange to the effect that "in all cases of loans on the deposit of security, the lender is bound to return the identical securities deposited, unless it be otherwise stipulated at the time of making the loan; but this liability does not apply to a member who has taken in stock or shares upon continuation at the market price," was offered in evidence in an action by the plaintiff to recover the amount of profit realized by the defendants from the use they had made of his stock; and the court held that the rule was conclusive on the subject; that the pledgee was bound to return the identical shares pledged, and that, the sale of the pledge being a wrongful conversion, the plaintiff was entitled to recover. The court added that an alleged custom for a pledgee to sell pledged stock being in direct opposition to the express rule was bad, and also observed that the pledgee had no right by the common law to sell the stock pledged, citing *Ex parte Dennison*, 3 Vesey 552.

In reading this case carefully, it will be observed that it went off on the fact of there being an express rule of the Stock Exchange on the subjects forbidding re-hypothecation, and that a custom of the Stock Exchange to the contrary could not prevail. And besides the

case, according to the principle of the American cases, must have been decided in the plaintiff's favor, as evidently the pledgees did not keep on hand a sufficient number of shares to satisfy the amount of security deposited, on demand and payment of the loan. So that notwithstanding the remarks of *MALINS*, V. C., which were not necessary to the decision of the question, this decision cannot be taken to militate against the rule laid down in the principal case or in those we have adverted to.

It will be seen in the foregoing cases that the shares were actually transferred to the pledgee. Suppose, however, the pledger merely handed the certificates to the pledgee with a power of attorney in blank to transfer, and the pledgee did not have them transferred to his own name, would the pledger be entitled to the identical certificates he had pledged on demand and tender of payment? This is a question that is perhaps scarcely worth while to do more than suggest, as the damage, like shares being equal in value, would be not material, the pledger having suffered none by a return of other like shares.

If the pledgee of stock, always keeping sufficient amount on hand to satisfy the pledges may sell the shares pledged to him, he certainly can pledge them, though in the state of Pennsylvania there is a statute against all hypothecation of stock by the pledgee, which makes it a penal offence; see Act of May 25th 1878 (P. L. 155), somewhat modified by the supplement passed on June 10th 1881 (P. L. 1881, 107), excepting from the operation of the Act of 1878, the hypothecation of stock not fully paid for, and carried by the broker.

A somewhat kindred question of considerable interest is also suggested by the points raised in the principal case as well as by the late case of *Cherry v. Frost*, 21 Am. Law Reg. (N. S.) 57, and the interesting note to that case.

The annotator of that case considered

"the position of the sub-pawnee * * * without notice, of a non-negotiable security," and it is our intention to go a step further and consider the two broad propositions, viz. : *first*, whether a party, who has deposited an article for the security of a debt, can, on the pawnee re-hypothecating the same, treat the original contract of pawn at an end, so as to bring an action of detinue or trover against the sub-pawnee without tendering the amount of the original debt for which the security was given, and

Secondly, if such re-hypothecation does not terminate the contract of pawn, whether a party, with whom an article has been left as a security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawner) to a third party.

It must be borne in mind, as was remarked in the late case of *Donald v. Suckling*, L. R., 1 Q. B. 618, that we are not dealing with the case of a lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention, and that an unauthorized transfer of the thing does not transfer that personal right. The cases which established in England before the Factor's Acts, that a pledge by a factor gave his pledgee no right to retain the goods even to the extent to which the factor was in advance, proceed on this ground.

In *Daubigny v. Dural*, 5 Term Rep. 606, BULLER, J., proceeded on the ground that "a lien is a personal right and cannot be transferred to another."

In *Legg v. Evans*, 6 M. & W. 36, where an action of trover was brought

against a sheriff of Middlesex, to recover some pictures, who justified under an execution, the plaintiff replied by setting up a lien on the goods, which was held good on demurrer. PARKE, B., said : "If we consider the nature of a lien and the right which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a personal right which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description which is a personal interest in the goods." And in *McCombie v. Davies*, 7 East 6, Lord ELLENBOROUGH remarked that "nothing could be clearer than that liens were personal and could not be transferred to third persons by any tortious pledge of the principal's goods."

In *Coggs v. Bernard*, 2 Ld. Raym. 916, Lord HOLT is reported to have said that a "pawnee has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him." And again in *Mores v. Conham*, Owen 123, the court used language to the same effect, saying, that the pawnor "hath such interest in the pawn as he may assign over, and the assignee shall be subject to detinue if he detains it upon payment of the money by the owner.

In *Donald v. Suckling*, *supra*, the majority of the court relied principally on the case of *Johnson v. Stear*, 15 C. B. (N. S.) 330. There, one Cumming, a bankrupt, had deposited with the defendant two hundred and forty-three cases of brandy, to be held by him as a security for the payment of an acceptance of the bankrupt, discounted by the defendant, and which would become due on January 29th. and in the event of such acceptance not being paid at maturity, he was to be at liberty to sell the brandy and apply the proceeds to the payment of the acceptance. On January 28th, the defendant contracted to sell the

brandy to a third party and delivered him the dock-warrant on the 29th, and on the 30th the third party got possession. An action of trover was brought by the assignee of the bankrupt, and the majority of the court held (ERLE, C. J., BYLES and KEATING, JJ.; WILLIAMS, J., *dissentiente*), that the plaintiff was only entitled to nominal damages, because "the deposit of the goods in question with the defendant to secure repayment of a loan on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien; and the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnee in the goods under the contract."

In *Donald v. Suckling*, *supra*, it was held by the court (MELLOR and BLACKBURN, JJ., and COCKBURN, C. J.; SHEE, J., *dissentiente*,) that, where debentures had been deposited as security for the payment of a bill of exchange, with a right on the part of the depositor to dispose of them on the non-payment of the bill when due, and the pawnee re-hypothecated them to a third party for a valuable consideration, the original pawnor, while the bill was still unpaid, could not maintain an action of detinue against the latter for the recovery of the debentures, without first tendering him the amount of the bill. In the course of his opinion, BLACKBURN, J., said: "Story, in his treatise on Bailments, sect. 327, says, 'But whatever doubt may be indulged as to the case of a factor, it has been decided, that is, in America, that in case of a strict pledge, if the pledgee transfers the same to his own creditors, the latter may hold the pledge until the debt of the original owner is discharged.' In Whitaker on Liens, published in 1812, p. 140, the law is laid down to be that the pawnee has a special property beyond a lien. I do not cite this as an authority of

great weight, but as showing that this was an existing opinion in England before Story wrote his treatise. * * * Now, I think that the subpledging of goods held in security for money, before the money is due, is not in general so inconsistent with the contract as to amount to a renunciation of that contract. There may be cases in which the pledger has a special, personal confidence in the pawnee, and, therefore, stipulates that the pledge shall be kept by him alone; but no such terms are stated here, and I do not think that any such term is implied by law. In general, all that the pledger requires is the personal contract of the pledgee that, in bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a sub-pledge."

There are not many American decisions on this question, because, as is pointed out by the annotator to *Cherry v. Frost*, 21 Am. Law Reg. 66, the cases that have arisen in respect to the re-hypothecation of securities have gone off on the question of estoppel, as for instance, *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Jarvis v. Rogers*, 13 Mass. 105; *Wood's Appeal*, 8 Weekly Notes Cases (Phila.) 441; but in *Talty v. Freedman's Savings and Trust Co.*, 3 Otto (U. S.) 321, SWAYNE, J., approved the ruling in *Donald v. Suckling*, *supra*.

In *Thompson v. Patrick*, 4 Watts (Pa.) 414, however, the court said, "The principles of the present action have long been settled, in *Mores v. Conham*, Owen 123; *Anon.*, 2 Salk. 522, and *Coggs v. Bernard*, 3 Salk. 268. As a pawnee has a special property in the thing pawned, he may assign it; and his assignee may consequently assert his title to it against the owner, or one standing in his place. He may even use the pawn, provided

it be not the worse for it, if the keeping of it be a charge to him * * *."

In *Bank v. Trenholm*, 12 Heisk. (Tenn.) 520, an action of trover was held to lie against a factor, as pledgee, or against his sub-pledgee, without notice, though he pledged but up to his lien.

In *First Nat. Bank of Louisville v. Bryce*, 19 Am. Law Reg. (N. S.) 503, it was held that a re-pledge of goods by a factor terminates the contract of pledge, though the sub-pledgee has a right of set-off against the original pledgor. The court here considered the position of a factor who had made advances and that of a pledgee analogous.

In considering the point involved in the second question of our note, namely, conceding the contract of pledge is not terminated on the original pawnee re-hypothecating the article pawned, is it such a breach of the contract of pawn, as to enable the original pawnor to bring an action for damages against the original pawnee therefor.

Thompson v. Putrick, *supra*, was an action of trover by the sub-pawnee, to recover possession of a set of harness loaned him by the pawnee, against one Thompson, the original pawnee's agent, who had surreptitiously obtained possession of it; and it was held that, though the use of the harness by the sub-pawnee might have deteriorated the value of it, yet Thompson "could not retain the possession of it, surreptitiously obtained, against the pawnee or the plaintiff in his stead." The court said the pawnee may use the pawn, but at his peril. "But though he use it even tortiously, he is answerable for the consequences but by action. It has not indeed been expressly ruled that an improper use of it does not work a forfeiture of his lien; but neither is there any determination to the contrary, and the reason as well as the justice of the thing, is strong to show that he ought not to lose his security for a sub-

stantial debt by having caused perhaps an inconsiderable damage, for which there is an independent remedy graduated to the exact measure of it."

In *Donald v. Suckling*, *supra*, the point under consideration was not decided. BLACKBURN, J., said, that in England there were strong authorities to the effect that the contract of pledge, when perfected by delivery of possession, created an interest in the pledgee that might be assigned. MELLOR, J., said, "I think that, when the true distinction between the case of a deposit by way of pledge of goods for securing the payment of money and all cases of *lien*, correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that, although he (the pawnee) cannot confer upon any third person a better title or a greater interest than he possesses; yet if, nevertheless, he does pledge the goods to a third person for a greater interest than he possesses, such an act does not annihilate the contract of pledge between himself and the pawnor; but that the transaction is simply inoperative as against the original pawnor, who, upon tender of the debt secured, immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in re-pledging the goods."

COCKBURN, C. J., however, remarked, "I think it unnecessary to the decision in the present case, to determine whether a party, with whom an article has been pledged as a security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite incon-

sistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged—as in the case of a valuable work of art—that the pawnor, though perfectly willing that the article should be entrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others, and committed to the custody of strangers. * * * I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action; for nominal damage if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged.”

In the late case of *Halliday v. Holgate*, L. R., 3 Exch. 299, A. deposited certificates of scrip with the defendant as security for a loan, and, on his becoming bankrupt, the defendant sold the scrip without demand or notice, to repay himself the debt. The creditor's assignee, without making a tender of the debt, brought an action of trover against the defendant, and the court held, that the action would not lie. WILLES, J., said, “It has been argued that the plaintiff is at any rate entitled to nominal damages, for that a conversion was committed by the sale of the certificates. That sale, it is contended, had the effect of putting an end to the bailment of pledge; the property of the pledgee was thereby determined, so as to enable the assignee to say that, at the moment when the sale took place, he became entitled to the certificates by virtue of the general property which was then reposed in him. This reasoning

proceeds upon a somewhat subtle and narrow ground, for it is admitted that the assignee could claim only nominal damages. But we cannot arrive at the conclusion that he is so entitled without getting rid of the case of *Donald v. Suckling*,” *supra*. * * * “There are three kinds of security: the first, a simple lien; the second, a mortgage passing the property out and out; the third, a security intermediate between a lien and a mortgage, viz., a pledge, where, by the contract, a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true, the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor, he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents, by his act, to revest in the pledgor the immediate interest or right in the pledge, which, by the bargain, is out of the pledgor and in the pledgee. Therefore, for any such wrong, an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff is not maintainable, for that right clearly is not in the plaintiff.”

A consideration of the foregoing cases seems to show that, in England at least, a sub-pledge of the article pledged, does not terminate the contract of pledge so that an action of detinue or trover would lie by the pawnor against the

pawnee, or his assignee, without first tendering the amount of the debt which the pledge was given to secure. At the same time it is difficult to find an authority to the effect that a sub-pledge is legal.

It is true that the English authorities have held that, without a tender of the amount of the debt, an action of detinue or trover would not lie against the pawnee or his assignee, but that was because of certain technical reasons; and *Donald v. Suckling*, *supra*, and *Halliday v. Holgate*, *supra*, are not authorities for the proposition that it is not a breach of the contract of pawn, for the pawnee to re-hypothecate the article pledged.

In some of the United States the technical English rule has not been followed, and in *Work v. Bennett*, 70 Penn. St. 484, an action of trover was successfully brought to recover damages for an alleged illegal conversion by a sub-pledge of the article pawned, and sale by the sub-pledgee without a tender of the amount of the debt. *SHARWOOD, J.*, said: "Had the stock and bonds (the pledge) which were the

subject of this action of trover, remained unconverted in the hands of the defendants, the plaintiff could not have recovered without a tender of the amount of the debt for which they were then pledged, or proof of payment of such debt. But they had wrongfully converted them by pledging them for their own debt, and a sale afterwards by their pledgees, without notice to the plaintiff. This dispensed with any tender before suit brought. * * * " Here a recoupment for the balance due defendant from the damages for the conversion was allowed. Apparently the case of *Thompson v. Patrick*, 4 Watts 414, was not cited on the argument, nor considered by the court.

In New York, Tennessee and Kentucky the courts also seem to consider re-hypothecation by the pawnee as illegal; see *Bank v. Trenholm*, 12 Heisk. (Tenn.) 520; *Allen v. Dykers et al.*, 3 Hill (N. Y.) 593; *Bank v. Bryce*, *supra*; but see, *Wood v. Hayes et al.*, 15 Gray (Mass.) 375; *Fay v. Gray*, 124 Mass. 500, and *Thompson v. Patrick*, *supra*.

ARTHUR BIDDLE.

Supreme Court of Indiana.

CHATARD v. O'DONOVAN.

Where a Catholic priest is subject to be removed at the pleasure of the bishop, having charge over him, he is not entitled to a notice to quit the parsonage of the parish over which he had charge, under a statute requiring a notice from landlord to tenant.

The relationship, in such case, of the priest and bishop, is that of master and servant, and not that of landlord and tenant.

The right of occupancy of the parsonage by the priest, in such case, is only incidental to his charge over the parish, and when he is deprived of the latter the former is gone.

APPEAL from the Hendricks Circuit Court.

This was an action by appellant to recover of the appellee the possession of certain real estate. The complaint set forth that, on

July 20th 1876, the Right Reverend Maurice De St. Palais was the Roman Catholic Bishop of Vincennes ; that according to the rules, regulations and customs of the Roman Catholic Church, it is the duty of the bishop to supervise the congregations in his diocese, and to control, hold and own all the real and personal property in use by said congregations ; to exercise authority over the pastors in charge of such congregations, and in the exercise of his discretion, to continue such pastors in their position or to suspend or remove them therefrom ; that upon the suspension or removal of such pastors, it was their duty, according to the laws, rules, regulations and customs of the Roman Catholic Church, to deliver and surrender to the bishop all the property, real and personal, in their occupancy or possession as such pastors ; that on the date above mentioned, the real estate in controversy was conveyed to said Maurice De St. Palais, in trust for the Catholic congregation of Brownsburg, Indiana ; that said congregation was an unincorporated congregation, subject to the ecclesiastical authority, jurisdiction and control of the said bishop ; that on June 28th 1877, said Maurice De St. Palais, died, leaving by his will the said property to the Archbishop of Cincinnati upon like trusts ; that on March 26th 1878, the plaintiff, Francis Silas Chatard, was duly appointed Bishop of Vincennes to succeed the said Maurice De St. Palais, and that on October 30th 1878, the said archbishop conveyed to him the said property upon the same trusts ; that in the year 1877, the defendant, Dennis O'Donovan, a priest of the Roman Catholic Church, had been appointed to the position of pastor of the said Roman Catholic congregation at Brownsburg by the said Maurice De St. Palais, and as such pastor, at the date of the appointment of plaintiff as bishop, was occupying the premises in question for a parsonage and for a house for religious worship ; that on December 15th 1880, the plaintiff, in the exercise of his discretion as bishop, removed the said defendant from the position of pastor of said congregation, and on April 26th 1881, caused a written notice to be served on him to deliver up to plaintiff possession of the said real estate at the expiration of one month from that time ; that although the month had expired defendant refused to surrender possession of said real estate, and had prevented the members of the congregation (and the priest sent by plaintiff) from occupying the same ; that the time given for removal was a reasonable time, and that plaintiff was entitled to have possession.

To this complaint defendant demurred. The court below sustained the demurrer, and plaintiff appealed.

Charles Foley and Baker, Hord & Hendricks, for appellant.

No counsel appeared for appellee.

The opinion of the court was delivered by

WOODS, J.—We have no brief from the appellee. It is stated in the appellant's brief that the ruling of the Circuit Court was put upon the ground that the facts alleged in the complaint showed the relation of landlord and tenant between the parties, and that sects. 2 and 3 of the act concerning that relation (2 R. S. 1876, p. 338; R. S. 1881, p. 1128), made it a tenancy from year to year, determinable by a three months' notice prior to the expiration of a current year.

The question thus presented is plainly an important one, not only as the decision may affect the policy and administration of the affairs of the church directly concerned, and perhaps other church societies which furnish houses for the use of their pastors, rectors and preachers, but the owners and occupants of real property generally. For it is readily conceivable that in many instances the owner and tenant will be, in all essential respects, in the same legal relation as the parties to this record; as, for example, the servant brought into the dwelling, or upon the premises of the employer, and, as an incident to the employment, allotted a room or tenement to occupy while the service lasts; the mechanic or laborer who, by the terms of his engagement, has the possession or use of a house belonging to the employer, and for which the rent is to be deducted from his wages, or for which he is to pay no specified rent, and makes compensation only by accepting less wages than he would receive if he occupied a house of his own.

While these supposed cases, like the one before us, show the parties in relations somewhat like the ordinary relation of landlord and tenant, they are yet clearly and broadly distinguishable therefrom. The case of *Kerrains v. People*, 60 N. Y. 221, is instructive. It was there held that, "Where the occupation of a house by a servant is connected with the service, or is required by the employer for the necessary or better performance of the service, the occupation is as servant, not as tenant, and the possession is

that of the master." In the course of the opinion in the case, CHURCH, C. J., says: "Such, clearly, was the case of *Haywood v. Miller*, 3 Hill 90, where a farmer hired a man and his wife to work a farm for wages. The occupation of the house was necessary to the performance of the service; and *The People v. Annis*, 45 Barb. 304, was substantially the same, although I am unable to agree with the learned judge who delivered the opinion in that case, that immediately upon the termination of the service, a tenancy at will, or by sufferance springs up." * * * "The question depends on the nature of the holding, whether it is exclusive and independent of and in no way connected with the service, or whether it is so connected or is necessary for its performance. And this, I think, is the result of all the cases. The question has often arisen in England, under the poor laws, to determine what occupation would confer a settlement, the courts recognising, as controlling, the distinction between an occupant as a tenant or as a servant." (Cases cited.) "The case of *Hughes v. Chatham*, 5 M. & G. 54, arose under the reform act, requiring a registry of voters, the statute requiring that the person should occupy as owner or tenant. * * * TINDAL, C. J., in delivering the opinion of the court, said: 'There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee for years or at will, or for any other estate or interest, and if he do so, the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration.' * * * 'And as there is nothing in the facts stated to show that the claimant was required to occupy the house for the performance of his services, or did occupy in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services; and as the case expressly finds that he had the house as a part remuneration for his services we cannot say that the conclusion at which the revising barrister has arrived is wrong."

"I have cited the language of the court," says CHURCH, C. J., "because it lays down concisely the correct rule for determining the question involved in this class of cases." And proceeding with a recital of the facts in the case before him, he adds: "The inference from these facts is reasonable, if not irresistible, in the

absence of any allowance for rent, that the house was intended to be occupied by an employee for the benefit of the owner in carrying on the mill. The case thus presented is analogous to that of a person employing a coachman or gardener, and allowing or requiring him to reside in a house provided for that purpose on the premises, or a farmer who hires a laborer for wages to work his farm, and live in a house upon the same. In these cases the character of the holding is clearly indicated by the facts."

"Many servants," says MANSFIELD, C. J., in *King v. Stock*, 2 Taunt. 339, "have houses given them to live in, as porters at park gates. If a master turns away his servant, does it follow that he cannot evict him till the end of the year." To the same effect, see *McQuade v. Emmons*, 38 N. J. L. 397; *Doyle v. Gibbs*, 6 Lans. 180.

While it may not be said upon the facts of the complaint, that the defendant was the hired servant of his bishop, it does appear that he was appointed to his position by, and held it at the discretion of, the bishop, and that his possession of the property was only an incident to his appointment, the better to enable him to discharge the duties of his office; and when in the exercise of that discretion, which by the rules and customs of the church he had the right to employ, the bishop removed the defendant from his charge or pastorate over the congregation, his right to possession of the property at once necessarily ceased.

If, under the circumstances, the parties should be deemed to have come under a contract relative to each other, the plain meaning of the contract was, that when the defendant should cease to be pastor, which might be at the will of his bishop, he should cease forthwith to occupy the property, there being from the nature of the case, no right of occupancy except as an incident to the performance of the duties of pastor. And if this be regarded as a tenancy, it was a tenancy at will, and determined "by one month's notice in writing delivered to the tenant," which notice the complaint shows to have been given.

We are, however, of the opinion that the relation of the parties was more like that of master and servant, the possession of the priest being in fact the possession of his superior, the bishop, who had power at any time, and upon his own judgment or discretion, to remove one and install another in the office of pastor, and in the possession of the property of the office.

The judgment is reversed with costs, and with instructions to overrule the demurrer.

We are aware of no case where the exact point involved in the principal case has been decided; nor did counsel for the appellant, in a very lengthy brief, cite one. The principle applied to the relation of bishop and priest in the occupancy of church property, is that of master and servant. It is true the complaint alleges that the defendant had been served with one month's notice to quit; but this averment and service of notice was entirely unnecessary, since he knew what his duty was on removal from the charge of the spiritual care of the parish, and that this duty involved the necessity of delivering up the occupancy of the church building and the parsonage to the bishop or his successor. This involves the important principle that, where the party affected knows his duty, or is bound to know it, notice to him of it is not necessary.

The court very properly takes the position that the occupancy of the church and parsonage is only incident to the right of having charge over the parish; that when the latter is taken away, the former must of necessity fall. Underlying this is the doctrine recognised and enforced by all the courts that, whenever questions of faith or discipline, or ecclesiastical rule, custom or law have been decided by the proper church officer or judicatory to which the matter has been carried, the legal tribunals must accept such decision as final, and as binding on them, in their application to the case before them.

So far as appears from the complaint, the bishop had a perfect right to remove the priest whenever he saw fit, either with or without cause. It is undoubtedly the true principle that, "in an organized church, with written or printed rules, and established doctrines and modes of worship, the right is

qualified. The continuance, power and emoluments of the position depend on the will of the church, the right is contingent and restricted, and as a thing of value is very much lessened. The sentence of the church judicatory, in a proper case, deprives of the position, and salary and emoluments are gone :'' *Chase v. Cheney*, 58 Ill. 509; s. c. 10 Am. Law Reg. (N. S.) 295.

But this branch of the case has been so often discussed in the pages of this magazine, and by such able jurists, that any further comments are unnecessary. There is undoubtedly some conflict, as Judge REDFIELD has shown in his notes to cases, but in the main there is no disagreement as to the general principles governing the cases. Upon this subject it is sufficient to call the readers attention to the article of Hon.

WILLIAM LAWRENCE in 12 Am. Law Reg. (N. S.) 201, on "The law of religious and church corporations in Ohio;" and also generally upon religious societies and church corporations in the same volume on pages 329, 336, and in volume 13, page 65, by the same author. We also call the reader's attention to the following cases: *Lynd v. Menziers*, 8 Am. Law Reg. 94; s. c. 33 N. J. L. 162 (1866); *Gartin v. Penick*, 9 Am. Law Reg. (N. S.) 210, and note; s. c. 5 Bush 110 (1868); *Fulton v. Farley*, 9 Am. Law Reg. (N. S.) 401, and note; *Chase v. Cheney*, 10 Id. 295, and note; s. c. 58 Ill. 509 (1871); *Watson v. Jones*, 11 Am. Law Reg. (N. S.) 430, and note; s. c. 13 Wallace 679 (1871); *Hennessey v. Walsh*, 15 Am. Law Reg. (N. S.) 264, and note; s. c. 55 N. H. 515 (1875); *Perry v. Wheeler*, 17 Am. Law Reg. (N. S.) 24, and note; s. c. 12 Bush 541 (1878). All these notes were written by Judge REDFIELD, except the last, which was

written by Hon. R. H. DANA, Jr., and part of the note to *Chase v. Cheney*, which was written by M. W. FULLER.

In addition to the above-cited cases and those cited in the notes, we beg leave to call attention to the following recent cases upon the subject: *McAuley's Appeal*, 77 Penn. St. 397; *Feisel v. Munzenmeier*, 10 Kan. ; *Kinkcad v. McKee*, 9 Bush 535; *First Presbyterian Church of Louisville v. Wilson*, 14 Id. 252; *Venable v. Baptist Church*, 25 Kans. 177; *Kilpatrick v. Graves*, 51 Miss. 432; *Jones v. Wadsworth*, 11 Phila. R. 227; *O'Harra v. Stack*, 90 Penn. St. 477; *Kerr's Appeal*, 89 Id. 97.

As we have previously said, the principle announced in the principal case is applicable to the relation of master and servant, and not to landlord and tenant. The court also takes occasion to say that the same principle is applicable, in addition to its application to the relation of master and servant, to the relation of "the mechanic or laborer, who, by the terms of his engagement, has the possession or use of a house belonging to the employer, and for which the rent is to be deducted from his wages, or for which he is to pay no specific rent, and makes compensation only by accepting less wages than he would receive if he occupied a house of his own." If, in such case, the relation of landlord and tenant exists, it must be by the terms of the contract, and to that recourse must be had in determining the respective rights of the parties. If the rental value of the house or shop occupied by the servant, laborer or mechanic, is only part pay for his services, then no tenancy exists; but if, on the contrary, he is to receive so much for his labor, and pay back so much per month or week, for the use and occupation of the house or shop, and has complete control over the premises, that relation does exist. We proceed to cite a few examples illustrating this principle.

Where the defendant hired the plaintiff for one year, on his farm, for the sum of \$270, and was to furnish him his house-room for himself and family, a garden, and a pasture for a cow, it was held that this was not a demise of the premises in the nature of a lease, creating the relation of landlord and tenant. *People ex rel. Hubbard v. Annis*, 45 Barb. 304, it was said that the relation was simply that of employer and employee, or master and servant, and the house-room, garden and pasture of the cow are parts merely of the contract for service, and operate as a portion of the consideration of that agreement: *Comstock v. Dodge*, 43 How. Pr. 97. So where one occupying a house as a servant of the owner, upon the termination of the service was permitted to retain possession upon payment of rent until the condition of his wife should allow her removal, it was held that, the duration of the occupancy depending on a contingent future event, the relation of tenancy at will, or by sufferance, did not arise between the parties, and that the occupant held as a mere licensee for the time agreed, and no notice to quit was necessary: *Doyle v. Gibbs*, 6 Lans. 180. So where the evidence showed that the plaintiff was employed by the defendant by the month; that as compensation for the services to be rendered by the plaintiff, he was to receive from the defendant \$25 a month and the use of a house for himself and family, so long as he might work for the defendant in an acceptable manner; that under this agreement the plaintiff went into the occupancy of the house in question, the same being the tenant house standing and being upon the property owned by the defendant, and engaged as the servant of the defendant; that he continued in such service and occupancy until the defendant becoming dissatisfied with the plaintiff, discharged him from his employment; it was held that the relation of landlord

and tenant did not exist. "The occupation of the house by McQuade and his family was a part of his compensation for the performance of his engagement with the defendant; it does not show any demise of the house; the possession of McQuade was the possession of his employer, and when he was dismissed from service, and the legal relation existing between them thereby put to an end, his right of occupancy was ended, and his longer remaining on the premises of his master was a trespass." *McQuade v. Emmons*, 38 N. J. L. 397. This is also true where the occupant is to receive a part of the crop cultivated by himself as his pay: *Guest v. Opdyke*, 31 N. J. L. 552; *State, Edgar pros., v. Jewell*, 34 Id. 259. See *Wilber v. Sisson*, 53 Barb. 258; *Putnam v. Wise*, 1 Hill 247; *Caswell v. Destruch*, 15 Wend. 379; *Dinehart v. Wilson*, 15 Barb. 595. See *Rollins v. Riley*, 44 N. H. 9.

A number of English cases have arisen upon the question of master and servant, so far as it appertains to the relation of landlord and tenant. Thus by agreement between S. and M., it was recited that S. was in possession of a messuage, whereon the sale of beer had been for some time past, and was then, carried on and conducted by U. for and on S.'s account; that M. was desirous of carrying on and conducting such trade for S., and which he had agreed to for the consideration after mentioned; and it was witnessed that S. agreed, in consideration of a bondsmen to be answerable for 50*l.* in default of payment by M., that M. should, from the date of the agreement, enter upon the premises, and carry on and conduct thereon such trade for S., in the place and manner, and with and upon the same privileges and terms, as U. had done, until the agreement should be determined by the notice after mentioned; and M. agreed, during all the time he should carry on and conduct the trade on the premises for S., that all the beer

which should be sold by M. on the premises should be taken by him from S., and that M. should not part with the trade or occupation without the license of S.; that, when either party should be desirous of determining the agreement, M., on receiving from S. a month's notice, without being paid any money or consideration by S., should quit and deliver up to S. the trade and possession of the premises, with all such fixtures and things belonging to S. as should then be thereon; and M. should be at liberty to leave the trade and quit the occupation on giving a month's notice to S. M. having entered into possession, it was held that M. occupied not as tenant, but as servant to S., and could not maintain trespass against S. for entering without a month's notice: *Mayhew v. Suttle*, 4 El. & Bl. 347.

So a servant put into occupation of a cottage, with less wages on that account, does not occupy it as a tenant, but the master may properly declare on it as his own occupation in an action on the case for a disturbance of a right of way over the defendant's close to such cottage. And it made no difference that the cottage was divided into two parts, one of which was only in the occupation of such servant, the other being occupied by a tenant paying rent: *Bertie v. Beaumont*, 16 East 33. See *Doe v. Cartwright*, 3 B. & A. 327.

As the court in *Kerrains v. People* remarked, a number of cases upon the question of tenancy has arisen in England under the poor laws. Thus where a pauper was permitted by several persons having a right of common to occupy a tenement of 10*l.* a year, as a reward for his service as a herd, it was held that such holding constituted a tenancy: *King v. Melkridge*, 1 Term 598. This case was followed in *King v. Minster*, 3 M. & S. 276, where it was expressly held that a servant receiving the use of a part of his master's house as part pay for his services did not constitute a ten-

ancy; but where the servant permitted a pauper living with him to hire a couple of cows which were kept on the land of the master, during the summer months, and it did not appear that their keeping was connected with the service, it was held that the pauper acquired a settlement, although if he had not had the two cows he would not. But see *King v. Kelstern*, 5 M. & S. 136, where it was said, "if the occupation be unconnected with the service, it will confer a settlement, but if it be necessarily connected with the service, as if it be necessary for the due performance of the service, it shall not confer a settlement." Per BAYLEY, J. See *King v. Chesnut*, 1 B. & Ald. 473.

The plaintiff was employed by the Highgate Archway Company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent. The company having ceased to collect toll at that particular spot, the plaintiff was dismissed from their employ, and received a notice to leave the house, which he promised to do. It was held that he was not a tenant of the company, and could not maintain trespass against the agent for pulling down the toll-house: *Hunt v. Colson*, 3 M. & Sc. 790; *Rex v. Lakenheath*, 1 B. & C. 531 (case of a schoolmaster.)

W. W. THORNTON.

Indianapolis, Ind.

Supreme Court of the United States.

AGER v. MURRAY.

A patent right may be subjected by bill in equity to the payment of a judgment debt of the patentee.

A decree sustained which directed that in default of payment of the judgment debt by a certain day the patent right should be sold and an assignment executed to the purchaser by the debtor, and that in default of the debtor executing such assignment a suitable person should be appointed trustee to execute the same.

APPEAL from the Supreme Court of the District of Columbia.

This was a bill in equity by a judgment-creditor to subject to the payment of his debt the interest of his debtor in patent rights. The case was heard in the Supreme Court of the District of Columbia upon bill and answers, by which it appears as follows:—

On the 10th of April 1876, Talbot C. Murray, in an action at law upon a promissory note, recovered judgment against Wilson Ager for the sum of \$2164.66, with interest and costs. Upon that judgment a writ of *fiery facias* was issued, and returned *nulla bona*. Wilson Ager had no real or personal property in the district subject to execution at law, but was the owner of sundry letters patent issued to him by the United States for useful inventions, which, if sold, would produce more than enough money to

satisfy that judgment. On the 26th of September 1876, he conveyed all his right and interest in these letters patent to the other defendant, Elisha C. Ager, who owned an equitable interest of one-third therein, and who, on the 8th of October 1877, reconveyed the patent rights to Wilson by an assignment which was not recorded in the Patent Office. Wilson Ager resides in the District of Columbia, and the other defendant resides in the state of California; and both appeared in the cause and answered to the merits of the bill.

The bill prayed for an injunction against further assignment pending the suit, and that the patents be sold under the direction of the court, and the proceeds of the sale applied to the payment of the judgment debt; and that the defendant, Wilson Ager be required to execute such assignment as may be necessary to vest title in the purchaser or purchasers, in conformity with the patent laws; and for further relief. The court entered a decree that in default of Wilson Ager paying by a certain day the judgment mentioned in the bill, with interest and costs, and the costs of this suit, the patent rights be sold and an assignment thereof executed by him as prayed for, and that, in default of his executing such assignment, some suitable person be appointed trustee to execute the same. From that decree the defendants appealed to this court.

The opinion of the court was delivered by

GRAY, J.—The single question argued before us is whether a patent right may be ordered by a court of equity to be sold and the proceeds applied to the payment of a judgment debt of the patentee.

A patent or a copyright, which vests the sole and exclusive right of making, using and vending the invention, or of publishing and selling the book, in the person to whom it has been granted by the government, as against all persons not deriving title through him, is property, capable of being assigned by him at his pleasure, although his assignment, unless recorded in the proper office, is void against subsequent purchasers or mortgagees for a valuable consideration without notice: Rev. Stat., sects. 4884, 4898, 4952, 4955. And the provisions of the patent and copyright acts, securing a sole and exclusive right to the patentee, do not exonerate the right and property thereby acquired by him, of which he re-

ceives the profits, and has the absolute title and power of disposal, from liability to be subjected by suitable judicial proceedings to the payment of his debts.

In England it has long been held that a patent right would pass by an assignment in bankruptcy, even without express words to that effect in the Bankrupt Act: *Hesse v. Stevenson*, 3 Bos. & Pul. 565; s. c. Davies Pat. Cas. 263; *Longman v. Tripp*, 2 New Rep. 67; *Bloxam v. Elsee*, 1 Car. & P. 558; s. c. Ry. & Mood. 187; 6 B. & C. 169; 9 D. & R. 215; *Mawman v. Tegg*, 2 Russ. 385; *Edelsten v. Vick*, 11 Hare 78; *Hudson v. Osborne*, 39 Law Jour. (N. S.) Ch. 79. In *Hesse v. Stevenson*, Mr. Justice CHAMBERE, in the course of the argument, said: "The right to the patent is made assignable; why then may it not be assigned under a commission of bankrupt?" 3 Bos. & Pul. 571. And Lord ALVANLEY, delivering the unanimous judgment of the court, after observing that it was contended "that the nature of the property in this patent was such that it did not pass under the assignment," and "that although by the assignment every right and interest and every right of action, as well as right of possession and possibility of interest, is taken out of the bankrupt and vested in the assignee, yet that the fruits of a man's own invention do not pass," said: "It is true that the schemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of such schemes, do not pass, nor could the assignee require him to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry:" 3 Bos. & Pul. 577, 578. The recent Bankrupt Act of the United States, in defining what property should vest in the assignee in bankruptcy, expressly enumerated "all rights in equity, choses in action, patent rights and copyrights," and required the assignee to sell all the property of the bankrupt for the benefit of his creditors: Rev. Stat., sects. 5046, 5062, 5064. The only difference is, that in England all such rights pass that become vested in the bankrupt before he obtains a certificate of discharge, whereas here only those rights pass which belong to him at the time of the assignment.

It has been said by an English text-writer that "a patent right may be seized and sold in execution by the sheriff under a *fiere facias*, being in the nature of a personal chattel:" Webster on Patents 23. We are not aware of any instance in which such a course has been judicially approved. But it is within the general jurisdiction of a Court of Chancery to assist a judgment-creditor to reach and apply to the payment of his debt any property of the judgment-debtor, which by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law; as in the case of trust property in which the judgment-debtor has the entire beneficial interest; of shares in a corporation, or of choses in action: *McDermutt v. Strong*, 4 Johns. Ch. 687; *Spader v. Hadden*, 5 Id. 280, and 20 Johns. 554; *Edmeston v. Lyde*, 1 Paige 637; *Wiggin v. Heywood*, 118 Mass. 514; *Sparhawk v. Cloon*, 125 Id. 263; *Daniels v. Eldredge*, 125 Id. 356; *Drake v. Rice*, 130 Id. 410.

In *Stevens v. Cady*, 14 How. 528, and again in *Stevens v. Gladding*, 17 How. 447, the point decided was that by a sale of the copperplate engraving of a map on execution from a state court against the owner of the copyright, the purchaser acquired no right to strike off and sell copies of the map.

Mr. Justice NELSON, in delivering judgment in *Stevens v. Cady*, said: "The copperplate engraving, like any other tangible personal property, is the subject of seizure and sale on execution, and the title passes to the purchaser, the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, to multiply copies of the map by the use of the plate, being intangible and resting altogether in grant, is not the subject of seizure or sale by means of this process—certainly not at common law. No doubt the property may be reached by a creditor's bill and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of creditors." He then cited the cases in Johnson's and Paige's Reports, above referred to, and added: "But in case of such remedy, we suppose it would be necessary for the court to compel a transfer to the purchaser, in conformity with the requirements of the copyright act, in order to vest him with a complete title to the property:" 14 How. 531.

In *Stevens v. Gladding*, Mr. Justice CURTIS said: "There

would certainly be great difficulty in assenting to the proposition that patent and copyrights held under the laws of the United States, are subject to seizure and sale on execution. Not to repeat what is said on this subject in 14 How. 531, it may be added that these incorporeal rights do not exist in any particular state or district; they are co-extensive with the United States. There is nothing in any Act of Congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of states and districts. That an execution out of the Court of Common Pleas for the county of Bristol, in the state of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island or New York, will hardly be pretended. That by the levy of such an execution the entire right could be divided, and so much of it as might be exercised within the county of Bristol sold, would be a position subject to much difficulty. These are important questions, on which we do not find it necessary to express an opinion, because in this case neither the copyright, as such, nor any part of it, was attempted to be sold:” 17 How. 451: The difficulties of which the learned justice here speaks are of seizing and selling a patent or copyright upon an execution at law, which is ordinarily levied only upon property, or the rents and profits of property, that has itself a visible and tangible existence within the jurisdiction of the court and the precinct of the officer; and do not attend decrees of a court of equity, which are *in personam*, and may be enforced in all cases where the person is within its jurisdiction: *Massie v. Watts*, 6 Cranch 148. And the terms in which he refers to the statement of Mr. Justice NELSON show that there was no intention to criticise or qualify that statement.

There are, indeed, decisions in the Circuit Courts that an assignee in insolvency, or a receiver, of all the property of a debtor, appointed under the laws of a state, does not, by virtue of the general assignment or appointment merely, without any conveyance made by the debtor or specifically ordered by the court, acquire a title in patent rights: *Ashcroft v. Walworth*, 1 Holmes C. C. 152; *Gordon v. Anthony*, 16 Blatchf. C. C. 234. But in *Ashcroft v. Walworth*, Judge SHEPLEY clearly intimated that the courts of the state might have compelled the debtor to execute such a conveyance. And the highest courts of New York and California have affirmed the power, upon a creditor's bill, to order the

assignment and sale of a patent right for the payment of the patentee's judgment debts: *Gillette v. Bate*, 86 N. Y. ; *Pacific Bank v. Robinson*, 57 Cal.

In *Carver v. Peck*, 131 Mass. 291, the court reserved the expression of any opinion upon that question, because unnecessary to the decision. And the assumption in *Cooper v. Gunn*, 4 B. Monroe 594, that an author could not be deprived, against his will, and in favor of any of his creditors, of any of the rights secured to him by the copyright acts, was merely *obiter dictum*, unsupported by reasoning or authority.

In the case at bar, the bill is filed by a judgment-creditor of the patentee in a court of the United States of appropriate jurisdiction, against the patentee, residing within the district and holding the entire legal title and two-thirds of the equitable interest in the patent right, and against the owner of an equitable interest in the remaining third, who is properly made a party to the bill. Both defendants are before the court and have filed answers. The debtor's interest in the patent rights is property, assignable by him, and which cannot be taken on execution at law. The case is thus brought directly within the opinion delivered by Mr. Justice NELSON in *Stephens v. Cady*, of the soundness of which we entertain no doubt.

The clause of the decree below, appointing a trustee to execute an assignment if the patentee should not himself execute one as directed by the decree, has not been objected to in argument, and was clearly within the chancery powers of the court as defined in the statute of Maryland of 1785, which is in force in the District of Columbia: Maryland Stat. 1785, c. 72, sects. 7, 13, 25; 2 Kilty's Laws; Laws of District of Columbia (ed. 1868) pages 326, 328, 333, 336.

Decree affirmed.

Supreme Court of Rhode Island.

WHIPPLE v. WHITMAN.

The American law, unlike the English, does not empower an attorney-at-law to settle a pending suit without the knowledge and assent of his client.

Courts in this country, however, are inclined to favor a compromise fairly made by an attorney, and will uphold it if good reasons can be found for it.

Hence the court refused to disturb a compromise made by an attorney, with the assent of the party in interest, but without the knowledge of the plaintiff of record, the attorney's client; the compromise appearing reasonable and advantageous.

A. sued, as trustee of his wife, who, under the Rhode Island statutes, could at any time by her sole act assign the claim sued. A.'s attorney, without his knowledge, but with the wife's assent, compromised the suit. A. waited nearly a year and then filed his petition for a trial of the cause; the wife claiming to have been coerced into giving her assent, but the coercion rose only from a mortgage executed by A. and his wife: *Held*, that the petition must be dismissed.

PLAINTIFF'S petition for a trial.

John M. Brennan, Ziba O. Slocum and James C. Collins, for plaintiff.

Henry B. Whitman, for defendant.

The opinion of the court was delivered by

DURFEE, C. J.—This is a petition for the trial of an action, brought in this court by the petitioner as trustee of his wife, in which judgment was rendered for the defendant on submission for ten cents costs. The petitioner alleges in the petition that his attorneys submitted to judgment without his knowledge and consent, and against his wishes and interest. He makes affidavit in support of the petition. The petitioner was in fact in jail under sentence for four months when the judgment was rendered, and it is not claimed that he personally either knew of or consented to it.

The action was for money lent. The money originally came from policies of insurance payable to the father of the petitioner's wife and assigned by him to her. According to the father's testimony the plaintiff had no ground for expecting to recover more than about \$3100, though, being inclined to exaggerate, he did in fact claim a much larger sum. The defendant on the other hand maintained and now testifies that he had paid all but \$1900, and that he had claims in set-off or counter claims in excess of that amount. One Samuel G. Curry also had a claim against the peti-

tioner and his wife for about \$1800, money lent on interest at five per cent. a month, for which he was secured by mortgage on the suit and on Mrs. Whipple's furniture. The judgment was the result of a settlement by which \$150 were paid to Mrs. Whipple; \$1200 to Samuel G. Curry in extinguishment of his claim, and \$300 to the attorneys to compensate them for their services. Mrs. Whipple also secured permission to occupy free of rent for a certain time her house, which was under mortgage to the defendant. The settlement was made with the consent and approval of Mrs. Whipple, acting under the advice of two trustworthy friends, men of business, whom she had called in at the suggestion of the attorneys. She, however, asserts that she consented under pressure. The inducement which principally led to the settlement, aside from the advantages of money in hand over money in suit, were, first the danger of delay which, owing to the ruinous rates of interest promised to Curry, was likely to prove as disastrous as defeat, and second to the possibility that an administrator might be appointed on the estate of Mrs. Whipple's father, at the instigation of the defendant unless he was appeased, and might contest her right to the money in suit on the ground that her father who was insolvent when he assigned to her, executed the assignment in fraud of his creditors. We are satisfied that the settlement was fair and probably advantageous, and that if the attorneys had power to compromise they are not chargeable with any abuse of their power. Judgment was rendered for the defendant in the action in April 1880. This petition was not filed until April 9th 1881. One of the results of the settlement was that the mortgage which Curry held on Mrs. Whipple's furniture was transferred for her benefit to her mother. This mortgage was subsequently surrendered, and a new mortgage given on the furniture, thus released, by the petitioner and his wife, to raise money for him. Under the new mortgage the furniture has been sold to satisfy the debt secured by it. The question is whether in view of all the circumstances, the settlement shall be upheld or a trial granted.

The decisions on the power of an attorney to compromise are contradictory. In England, however, the doctrine established by the later cases, after some vacillation, is, that the attorney has power by virtue of his retainer, to compromise the action in which he is retained, provided he acts *bona fide* and reasonably and does not violate the positive instructions of his client, and that the com-

promise will bind the client, even if he does violate instructions, unless the violation is known to the adverse party: *Swinfen v. Swinfen*, 18 C. B. 485; *Swinfen v. Lord Chelmsford*, 5 H. & N. 890; *Chambers v. Mason*, 5 C. B. N. S. 59; *Chown v. Parrott*, 14 Id. 74; *Prestwich v. Poley*, 18 Id. 806; *Fray v. Voules*, 1 El. & El. 839; *Butler v. Knight*, L. R., 2 Exch. 109; *Thomas v. Harris*, 27 L. J. N. S. Exch. 353; *In re Wood, Ex parte Wenham*, 21 W. R. 104. The reason is, the attorney, within the scope of his retainer, is considered the general agent of the client. And it is strongly argued in support of the power, that it ought to be upheld both as a matter of public policy and for the good of the client, inasmuch as the attorney generally knows vastly better than the client whether it is better to risk the trial of the suit or to compromise it, and is often called upon to do the one or the other suddenly in the absence of the client. See Wharton on Agency, § 590.

The English doctrine finds support in a few American cases: *Wieland v. White*, 109 Mass. 392; *Potter v. Parsons*, 14 Iowa 286; *Holmes v. Rogers*, 13 Cal. 191; *North Missouri Railroad Co. v. Stephens*, 36 Mo. 150; *Reinholdt v. Alberti*, 1 Binn. 469; but the main current of decision in this country seems powerfully against it: *Weeks on Attorneys-at-Law*, § 228; *Ambrose v. McDonald*, 53 Cal. 28; *Preston v. Hill*, 50 Id. 43; *Levy, Simon & Co. v. Brown*, 56 Miss. 83; *Pickett v. Merchants' Nat. Bank of Memphis*, 32 Ark. 346; *Walden v. Bolton*, 55 Mo. 405; *Mandeville v. Reynolds*, 68 N. Y. 528; *Wadhams v. Gay*, 73 Ill. 415; *The People v. Quick*, 92 Id. 580. The American courts, however, show a leaning in favor of such compromises, when fairly made, and readily uphold them if they can find grounds on which to do so, "although," says Chief Justice MARSHALL, in *Holker v. Parker*, 7 Cranch 436, 452, "an attorney-at-law, merely as such, has strictly speaking no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all and to create an impression that the judgment of the attorney has been imposed on or not fairly exercised." See also *Roller v. Wooldridge*, 46 Tex. 485; *Potter v. Parsons*, 14 Iowa 286.

In the case at bar there are several reasons why the court should not disturb the compromise. The compromise was in itself fair and reasonable if not eminently advantageous. We mention this

rather as a favorable feature than as an absolute reason for upholding the compromise, since a party who prefers litigation to settlement is generally entitled to enjoy his preference: *Fray v. Voules*, 1 El. & El. 839. The case here, however, was peculiar in its circumstances. The plaintiff was suing, not for himself, but as trustee for his wife. She was the real owner, so to speak, of the lawsuit. Under our statute (Gen. Stat. R. I. cap. 152, § 6), she might, for aught we can see, have assigned for valuable consideration, her equitable or beneficial interest in the suit or in the debt sued for, absolutely and without joinder with her husband, to some third person or even to the defendant himself. But if she had the right to do this, we do not see why she had not also the right, in the absence of her husband, acting under the advice of trustworthy friends, to enter into a fair and reasonable compromise of the suit. To hold that the husband might arbitrarily reject a compromise, which she desired, would be to put her completely at his mercy. It seems to us that the most which he could require, considering his purely titular relation to the suit, would be indemnity for his costs and expenses as trustee, which in the case here he seems to have substantially got in the settlement. It is true the wife claims to have acted under pressure, but the pressure, so far as appears, came from Samuel G. Curry, whom she and her husband by their contracts and mortgages had armed with highly oppressive powers. We do not think it was such as to invalidate the compromise. Moreover, even if this view were inadmissible, it was the duty of the petitioner, if he chose not to abide by the compromise, to repudiate it promptly and offer to do what he could to reinstate the parties in *statu quo*: *Mayer v. Foulkrod*, 4 Wash. C. C. 511; *Peru Steel and Iron Co. v. Whipple File and Steel Manuf. Co.*, 109 Mass. 464. He did not do so, but waited nearly a year before bringing this petition, enjoying meanwhile the benefit of the settlement. He does not even now offer restitution, but on the contrary he has taken advantage of the surrender of the mortgage on his wife's furniture to mortgage it anew, thus ratifying the settlement to that extent, and, as he cannot ratify in part without ratifying *in toto*, virtually ratifying it in its entirety.

We think, therefore, that a trial must be denied, but under the circumstances without costs.

Petition dismissed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.

SUPREME COURT OF GEORGIA.¹SUPREME COURT OF ILLINOIS.²

COURT OF ERRORS AND APPEALS OF MARYLAND.

SUPREME JUDICIAL COURT OF MAINE.³SUPREME COURT OF MISSOURI.⁴

ACTION.

Obstruction of Common Right—Individual Remedy.—For any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than any other person, but an action will lie for peculiar damages of a different kind, though even in the smallest degree: *Chicago v. Union Building Association*, 102 Ill.

The fact that property owners upon a street have been specially assessed as benefited by the opening of a part of the street some blocks off, and have paid such assessments, does not give them any special property in such street any more than to any other tax-payer, and gives them no equitable ground to enjoin the vacation of such part of the street: *Id.*

ADMIRALTY.

Maritime Law—Limited Liability Act—Foreign Vessel—Practice—Measure of Damages.—The Limited Liability Act of 1851, reproduced in sects. 4282, &c., Revised Statutes, applies to owners of foreign as well as domestic vessels, and to acts done on the high seas, except when a collision occurs between two vessels of the same foreign nation, or perhaps, of two foreign nations having the same maritime law: *Nat. Steam Nav. Co. v. Dyer*, S. C. U. S., Oct. Term 1881.

The courts of every country will administer justice according to its laws unless a different law be shown to apply, and this rule applies to transactions taking place on the high seas: *Id.*

Shipowners may avail themselves of the defence of limited liability by answer or plea, as well as by the form of proceeding prescribed by the rules of the Supreme Court: *Id.*

If the owners plead the statute, a decree may be made requiring them to pay the limited amount into court, and distributing said amount *pro rata* among the parties claiming damages. Such a proceeding is an "appropriate proceeding" under the statute: *Id.*

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

² From J. H. Lumpkin, Esq., Reporter; to appear in 66 Georgia Reports.

³ From Hon. N. L. Freeman, Reporter; to appear in 102 Illinois Reports.

⁴ From J. Shaaff Stockett, Esq., Reporter; to appear in 57 Maryland Reports.

⁵ From J. W. Spaulding, Esq., Reporter; to appear in 73 Maine Reports.

⁶ From T. K. Skinner, Esq., Reporter; to appear in 74 Missouri Reports.

It is not necessary for the owners to surrender the ship. They may plead their immunity, and abide a decree for the value of the ship and freight: *Id.*

The rule of damages for goods lost on the high seas is their value at the place of shipment, with all charges of lading, insurance and transportation, and interest at the rate of six per cent. per annum, but without allowance for anticipated profits. If the goods had no market value at the place of shipment, other means of ascertaining their value may be used, such as their usual price at the port of destination, with a fair deduction for profits and charges: *Id.*

ADVANCEMENT.

Declarations of Parent.—Loose declarations of a parent, that he intended an existing debt should be an advancement, not substantiated by writing, nor made to the child, nor assented to by him, nor accompanied by any act, are not sufficient to destroy a debt secured by a legal instrument in full force, and to change it into a gift by way of advancement, whether offered by the son to defeat the recovery of the debt, or by the representatives of the parent against the son to defeat his claim to a distributive share: *Hurley v. Hurley*, 57 Md.

ATTACHMENT. See *Partnership*.

Garnishment—Foreign Corporation—Common Law—How far adopted.—A foreign corporation doing business and having property in this state, is liable to garnishment, the same as a domestic corporation, and service of process may rightfully be made on its agent in this state: *Hannibal and St. Joseph Railroad Co. v. Crune*, 102 Ill.

The courts of this state are not required by our statute adopting the common law of England, to enforce local customs of that realm, as it does not prescribe local customs and statutes as a rule of action in this state. On the contrary, they are excluded: *Id.*

BILLS AND NOTES.

When Contract under Seal.—In order to make a note a contract under seal, it must be recited to be so in the body thereof; the mere addition of a scroll after the signature is not sufficient: *Skrine v. Lewis*, 66 Geo.

CONFLICT OF LAWS.

Municipal Bonds—Judgment of Federal Court.—When a county court, acting in obedience to a mandate from the federal court and in conformity with the laws of the state authorizing the levy of taxes to pay county indebtedness, has levied a tax for the purpose of paying a judgment of the federal court against the county, the state courts will not interfere to prevent its collection, on the ground that bonds on which the judgment was rendered were void. The judgment of the federal court will be held conclusive of their validity: *The State v. Ruiney*, 74 Mo.

The state courts will respect as valid a judgment of a federal court against a county on its bonds, notwithstanding the same bonds are held by the state courts to be void: *Id.*

When the legislature has clothed a municipal corporation with the right to levy taxes to pay debts, any court having jurisdiction to enforce the payment of a debt, may, by mandamus, compel the corporate authorities to levy a tax in conformity with the mode prescribed, and to the extent of the power conferred by law; but beyond this no court can go: *Id.*

CONSTITUTIONAL LAW.

Charter of Corporation—Reservation of Right of Repeal—Grant of same Franchises to New Corporation.—After the passage of a statute enacting that every act of incorporation thereafter passed, shall be subject to repeal at the pleasure of the legislature, the right of repeal becomes part of every subsequent act of incorporation: *Greenwood v. Union Freight Railroad Co.*, S. C. U. S., Oct. Term 1881.

After such repeal a corporation can originate no new transactions dependent solely on the power conferred by the charter and which could not be exercised by unincorporated private persons: *Id.*

The rights of the shareholders to the real and personal property acquired by the corporation, and rights of contract and choses in action are not destroyed by such repeal, and if the legislature has provided no specific mode of enforcing such rights, the courts will do so by the means within their power: *Id.*

So far as the property or franchises of the old corporation were necessary to the public use, the legislature could authorize a new corporation to take them on making due compensation therefor: *Id.*

A statute which, under a reserved right, repeals an act of incorporation and creates a new corporation with similar powers, the use of which requires the exercise of eminent domain, is not unconstitutional if it provides for compensation for the property of the extinct corporation so taken by the new one: *Id.*

CONTRACT.

Judicial Sale—Agreement not to Bid.—Property of S. was levied on and advertised for sale. M. agreed that if S. would permit him to buy it at the sheriff's sale, and would not have the price run up on him, he would buy and would pay to S. the difference between the price paid at the sale and \$1000, which S. claimed to be a fair valuation. Relying on this S. made no effort to pay the *fi fa* or stop the sale, as he could otherwise have done. M. bought for \$625. S. sued for the balance to complete the \$1000. *Held*, that the contract was founded on a sufficient consideration: *Matthews v. Starr*, 66 Geo.

Such a contract was not illegal: *Id.*

If the proposed purchaser desired to annul the contract, it was incumbent on him to have given notice to the defendant in the *fi. fa.* in ample time for him to have made other arrangements: *Id.*

CORPORATION.

Limitation on Power to issue Stock—Rights and Liabilities of Holders of Unauthorized Stock—Agreement between Company and Stockholders.—Where the amount of the capital stock of a corporation is limited by charter, all stock issued in excess of the limit is void: *Scovill v. Thayer*, S. C. U. S., Oct. Term 1881.

A holder of such stock is not entitled to any of the rights or subject to any of the liabilities of a holder of authorized stock : *Id.*

After partial payments on stock the company agreed with its stockholders that no further assessments should be made, and issued to them full paid certificates. In an action by the assignee in bankruptcy of the corporation against the stockholders to recover their unpaid subscriptions, *held*, that the agreement was void as to creditors, but that before the action could be maintained some proceeding in the interest of creditors to set aside the agreement and to make an assessment was necessary : *Id.*

Suit for Benefits—Conclusiveness of Decision of Corporation under By-laws.—The by-laws of the appellant (of which the appellee's intestate was a member), provided that whenever a member had cause of complaint on questions which related to his enjoyment of benefits, he should seek redress from his tribe, and if against him, on appeal from its decision to the Grand Tribe of Maryland, and on that to the Grand Tribe of the United States, and should he neglect to pursue such course, and should bring suit in a tribunal outside the order, he would be subject to expulsion. It appeared that the appellee's intestate pursued the course prescribed, and his claim having been decided against him, originally and on the appeals, he brought this suit to recover back sick benefits from the appellant. *Held*, that the proceedings mentioned being specially pleaded and relied upon as a bar to this action, were conclusive against the appellee's right to recover: *Osceola Tribe v. Schmidt*, 57 Md.

CRIMINAL LAW.

Right to be present at Trial—Waiver of.—The constitutional right of a prisoner to appear and defend in person and by counsel, to demand the nature and cause of the accusation, and to meet the witnesses face to face, is conferred for the protection and benefit of one accused of crime, but, like many other rights, it may be waived by him : *Sahlinger v. People*, 102 Ill.

So where a prisoner, after his trial has begun, voluntarily abandons the court room, and refuses to appear, he will be regarded as having waived a right which is guaranteed to him, and the court is under no obligation to stop the trial, but may proceed in his absence to final judgment. He will not be allowed to take advantage of his own fault : *Id.*

Murder—Intoxication—Effect on question of Degree—Reducing Charge to Writing.—Under a statute establishing degrees of the crime of murder, and providing that wilful, deliberate, malicious and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation : *Hoft v. People*, S. C. U. S., Oct. Term 1881.

Confession obtained by Artifice—A confession not induced by promises or threats is admissible in evidence, notwithstanding it was obtained by artifice practised upon the prisoner by the officer having

him in charge, and, when properly corroborated, will sustain a conviction : *State v. Phelps*, 74 Mo.

DAMAGES.

Railroad Employee—Negligence.—An employee of a railroad company who has been injured by its negligence without fault on his part, may recover general damages on account of pain, physical injury and general depreciation of power to labor, although no proof of the value of his services as such employee or in other business may be made : *Georgia Southern Railroad v. Neal*, 66 Geo.

Contract for Sale of Seed.—In an action by a purchaser of seed against the vendor on the latter's warranty, no fraud being alleged, the measure of damages is the purchase-money with interest and the expense of hauling the seed, preparing the land, sowing, &c., but plaintiff cannot recover for prospective profits on the land planted with the seed : *Butler v. Moore*, 66 Geo.

DEBTOR AND CREDITOR.

Voluntary Conveyance—Subsequent Creditors—Burden of Proof.—A voluntary conveyance made by a party solvent at the time, may be impeached and set aside by subsequent creditors, provided it be executed with the intention and design to defraud those who should thereafter become his creditors. Where such fraud is charged, the fraudulent purpose will not be presumed, but must be proved. The onus rests on the parties assailing the deed to establish the fraudulent intent by satisfactory proof : *Ingram v. Heather*, 57 Md.

EMINENT DOMAIN.

City—Change of Grade—Obstruction of Street.—Where a city under statutory authority constructed a viaduct or bridge on a public street, near its intersection with another street, thereby cutting off access to the first-named street from the plaintiff's house and lot over and along the street intersected, except by means of a pair of stairs, whereby the plaintiff's premises fronting on the latter street and near the obstruction were permanently damaged and depreciated in value, by reason of being deprived of such access, it was held, the city was liable to the plaintiff in damages for the injury : *Rigney v. City of Chicago*, 102 Ill.

EQUITY.

Jurisdiction—Bill to quiet Title.—The rule that a bill to quiet title and remove a cloud upon a party's title to land, lies only where the complainant is in possession of the land, or where he claims to be the owner and the land is vacant and unoccupied, applies only where the object of the bill is purely to remove a cloud from the title, and not where the primary relief sought is upon other and well established grounds, and the removal of the cloud is prayed only as an incident to that relief. The rule has no application where a deed is sought to be set aside upon the ground of fraud : *Booth v. Wiley*, 102 Ill.

ERRORS AND APPEALS.

Amount in Controversy—Separate Liability of Joint Litigants.—The

Supreme Court has no jurisdiction of an appeal by property holders from a decree refusing an injunction against the collection of assessments against their properties, to pay a claim of \$71,623 against the district in which they resided, it appearing that although their petition for the injunction was joint, no one petitioner was assessed at over \$2500, and that there was no joint liability: *Russell v. Stansell*, S. C. U. S., Oct. Term 1881.

EVIDENCE.

Duplicate Contract.—Where a contract is executed by the parties thereto in duplicate or triplicate form, they are all originals and primary evidence; and it does not require, in order to introduce one of the duplicates as evidence, that notice should be given to produce the other: *Totten v. Bucy*, 57 Md.

Opinion as to Mental Capacity—Employees.—Non-experts must state grounds and facts sufficient to justify the expression of an opinion, and the reasons for it, respecting mental capacity: *Kerby v. Kerby*, 57 Md.

Persons in the service of one alleged to be infirm in mind, and frequently or constantly about such person, and having business dealings together, are competent to express an opinion respecting the mental condition of such person: *Id.*

EXECUTORS AND ADMINISTRATORS. See *Surety*.

Failure to Account—Interest.—Where an administrator has used the funds of his intestate in his own business, rendering no account thereof, he is properly charged with compound interest thereon at ten per cent: *Cump's Creditors v. Cump's Administrator*, 74 Mo.

The failure to account raises the presumption of such use of the money: *Id.*

FIXTURES.

Rights of Mortgage.—Fixtures actually or constructively annexed to the realty, after the execution of a mortgage of the real estate become a part of the mortgage security, and, while the mortgage is in force cannot be removed or otherwise disposed of by the mortgagor or by one claiming under him, without the consent of the mortgagee: *Wight v. Gray*, 73 Me.

GARNISHMENT. See *Attachment*.

GIFT.

Donatio causa mortis—Bank Check.—To constitute a valid *donatio causa mortis*, there must be actual delivery of the subject of the gift in the lifetime of the donor. Delivery to an agent with directions to him to deliver to the donee after the death of the donor, and if he should recover, then to return the property to the donor, is insufficient: *Walter v. Ford*, 74 Mo.

Whether a bank check can be the subject of a *donatio causa mortis*, *quære?* *Id.*

HUSBAND AND WIFE.

Action for Slander of Wife—How brought.—An action for slanderous words spoken of a wife must be brought by the husband and wife

jointly; and the claim for damages must be made in behalf of them, as plaintiffs: *Newcomer v. Kean*, 57 Md.

INFANT.

Contract—Rescission of—Trover—Agent.—If minors having in their possession the consideration received by them upon the sale and delivery of their goods and chattels, desire to return the same to the party contracting with them and rescind the contract, they may do so during their minority as well as within a reasonable time after they come of age; and upon the refusal of the other party to accept the consideration returned and to restore the property, they may maintain trover, prosecuting their suit by *prochein ami* for the property withheld from them: *Towle v. Dresser*, 73 Me.

The rescission of a minor's contract in this manner through the intervention of an agent employed by him for that purpose, is not manifestly nor necessarily prejudicial to the minor, and is therefore not to be classed nor regarded as void; and his appointment of an agent for such purpose is at the worst only voidable; and the opposite party when thus notified of the rescission, if he refuses to accept the consideration returned and to restore the property, can no longer shield himself under the contract: *Id.*

INSURANCE.

Policy Payable to Children—Adopted Child.—By a life insurance policy in the name of a wife on the life of a husband, the amount of the policy was payable to the wife, her executors, administrators or assigns, if she survived her husband; otherwise to her children for their use or to their guardian if under age. The wife did not survive her husband; *Held*, that the children were the sole beneficiaries, and the policy became payable to them: *Martin v. Aetna Life Ins. Co.*, 73 Me.

In such a case where a child by adoption is the only child and is of age, and the circumstances show that the parties intended that he should be included in the benefits of the policy, he is entitled to all the proceeds of the policy, and an action upon it should be in his name: *Id.*

LIBEL.

Question for Jury.—Whether words declared upon are libellous or not is a question for the jury. The court should not instruct them that the words declared on are libellous, unless where crime is distinctly charged, if at all: *Beazeley v. Reid*, 66 Geo.

MASTER AND SERVANT.

Railroad—Section Foreman.—A section foreman, whose duty is to keep the track in repair and free from obstructions, in that particular represents the company, and is not a fellow servant with the switchman: *Lewis v. Railroad Co.* 59 Mo. 495, followed: *Hull v. The Missouri Pacific Railway Co.*, 74 Mo.

MORTGAGE. See Fixtures.

Deed of Trust—Release by Trustee—Rights of Subsequent Incumbrancer.—Where a deed of trust given to secure a debt is released by the trustee without authority of the party secured, and he has never

sanctioned or ratified the act, a subsequent incumbrancer, even without notice of the want of authority, cannot obtain a prior lien: *Barbour v. Scottish-American Mortgage Co.*, 102 Ill.

But if the party secured by the deed of trust authorizes the trustee to release the lien, or if he fails at once to repudiate the act of the trustee in making the release without authority, when informed of the fact, and lies by until third persons have advanced large sums of money upon the faith of what his agent has done, he will be estopped from repudiating the act as unauthorized: *Id.*

Assignee of Note—How far Protected.—Where a mortgagee, after an assignment of the notes secured by his mortgage, acquires the equity of redemption and enters a formal release of the mortgage upon the record, a party taking a mortgage from him upon the same premises without notice of the assignment of the notes, will acquire a lien superior to that of the holder of the assigned notes: *Ogle v. Turpin*, 102 Ill.

An assignee of notes secured by mortgage may protect his equitable lien on the mortgaged premises, by taking and putting upon record an assignment of the mortgage, so as to give notice of his interest, and thereby prevent others from being deceived by any subsequent satisfaction entered of record by the mortgagee: *Id.*

Payment by Mortgagee of Prior Encumbrance—Right of Redemption.—A mortgagee who has paid a prior mortgage or other encumbrance upon the land, is entitled to be repaid the sum so advanced when the mortgagor or his vendee comes to redeem: *McCormick v. Knox*, S. C. U. S., Oct. Term 1881.

MUNICIPAL BONDS. See *Conflict of Laws*.

Cancellation of, on Forged Assignments—Replacement.—Where the mayor and city council had wrongfully cancelled certificates of its stock belonging to a minor, upon assignments which were afterwards discovered to be forgeries, and had issued new certificates of the stock to the holders who had presented the certificates for cancellation and transfer, it was held, that the mayor and city council should replace the certificates of stock belonging to the minor, and pay to his guardian all arrears of interest due: *Council of Baltimore v. Ketchum*, 57 Md.

MUNICIPAL CORPORATIONS.

Liability on Warrants.—A county is not liable generally upon a warrant drawn upon a fund which has become exhausted, and which the county court has no power to replenish by taxation or otherwise: *Moody v. Cass County*, 74 Mo.

PARENT AND CHILD. See *Insurance*.

PARTNERSHIP.

Proof of—Declarations of one Member—Agent.—Sayings of one member of an alleged partnership, not made in the presence of the others, or brought to their knowledge and assented to or ratified by them, are inadmissible to establish the existence of the partnership so as to bind the other parties: *Flournoy v. Williams*, 66 Geo.

Payment of Individual Debt with Partnership Funds—Attachment in

Hands of Creditor.—The funds of an insolvent firm, paid by one partner upon his private debt, without the consent of the copartner, may be attached in the hands of the private creditor, by trustee process in behalf of a firm creditor, the private creditor knowing when he received the funds that they belonged to the firm: *Johnson v. Hersey*, 73 Me.

The principle applies, although the note upon which the payment is made, be the single partner's note with the copartner's name thereon as a surety; and although the money be collected by a draft given in the name of the firm to the order of an agent of the private creditor: *Id.*

Endorsement on Note of Individual Partner.—When a member of a firm makes his individual note payable to his own order, and indorses thereon his own name and the name of his firm, and receives and appropriates the proceeds thereof to his own use, the firm will be liable therefor, being duly notified, to an endorsee who, in good faith, for an adequate consideration purchased the same before maturity, ignorant of all the circumstances affecting its validity: *Reddon v. Churchill*, 73 Me.

The form of the note is not notice that it was given for the maker's accommodation and in fraud of the firm: *Id.*

The purchase of the note of a broker furnishes no presumption that the broker was the agent of the maker: *Id.*

PATENT.

Re-issue—Identity of Invention—Determination.—The question of the identity of the inventions described in the original patent and the re-issue is one for the court and not for the jury, unless it appears from the face of the instruments that extrinsic evidence is needed to explain terms of art or to apply the descriptions to the subject-matter: *Heald v. Rice*, S. C. U. S., Oct. Term 1881.

A patent for a machine cannot be re-issued for the purpose of claiming the process of operating that class of machines: *Id.*

PENSION.

Excessive Compensation to Agent—Recovery of Excess.—The U. S. Statutes provide severe penalties against any person taking or contracting to take from a pensioner more than the statutory price allowed for obtaining a pension. And taking an excessive sum is *per se* an unlawful and punishable act; although the taker intended no wrong or injury, and practised no deceit or duress; the intention is not an element of the offence: *Smart v. White*, 73 Me.

Money taken from a pensioner exceeding the statutory allowance for services in obtaining a pension, may be recovered of the taker by the pensioner, although obtained from him without any wrongful intention, and whether the pensioner when paying or allowing the sum, knew of the statutory protection or not. The parties do not stand *in pari delicto*: *Id.*

REMOVAL OF CAUSES.

Separate Controversy—Must involve distinct Cause of Action.—*Repeal of Sect. 639 Rev. Stat.*—To entitle a party to a removal under the second clause of the second section of the Act of March 3d 1875, there must exist in the suit a separate and distinct cause of action in respect

to which all the necessary parties on one side are citizens of different states from those of the other: *Hyde v. Ruble*, S. C. U. S., Oct. Term 1881.

The second clause of sect. 639 Rev. Stat. was repealed by the Act of 1875: *Id.*

SHERIFF'S SALE. See *Contract*.

SHIPPING.

Seaman's Wages—Extra Wages for discharge in Foreign Port—Action for.—A seaman discharged with his own consent in a foreign port, who was prevented by the conduct of the master from making application to the American consul at the place of discharge, may maintain an action at common law against the master for two months' wages as his part of the three months' extra pay which the U. S. R. S., sects. 4582, 4584 required the master to pay to the consul on account of the discharge of such seaman: *Wilson v. Borstel*, 73 Me.

SLANDER. See *Husband and Wife*.

STREET. See *Eminent Domain*.

Sidewalk—Obstructions—Negligence.—Sidewalks in front of a warehouse must not be obstructed by piles of cotton bales longer than is reasonably necessary to move the cotton from the delivery wagons into the warehouse. A stoppage of any part of the sidewalk longer than is necessary for such transit becomes a nuisance, and if a passer-by be injured by such obstruction without negligence herself, the warehouseman is responsible in damages: *Maddox v. Cunningham*, 66 Geo.

Even if the cotton bales be on the sidewalk but a reasonably necessary time for transit from the wagons to the warehouse, and yet be placed on the sidewalk so negligently as to cause injury to the passer-by by falling on her, the warehouseman is responsible: *Id.*

SURETY.

Administrator's Bond—Stipulation for Co-surety—Conversion of Assets—Settlement.—One who has signed an administrator's bond as surety cannot avoid liability by showing that he signed upon an understanding with the administrator that another person was also to sign, and that such understanding was made known to the probate court at the time of accepting him as surety, and that the other person never signed: *Wolff v. Schaeffer*, 74 Mo.

If an administrator who has converted assets of the estate by pledging them for his own purposes, fails to recover them when he might, his conduct constitutes a continuing breach of duty, and if he has given an additional bond after the original conversion, but while he might yet recover the assets, the sureties in both bonds will be liable: *Id.*

The surety on an administrator's bond is concluded by, and cannot attack collaterally, a final settlement from which there has been no appeal: *Id.*

UNITED STATES COURTS. See *Conflict of Laws*.

THE

AMERICAN LAW REGISTER.

AUGUST 1882.

**EXPERT TESTIMONY—SCIENTIFIC TESTIMONY IN
THE EXAMINATION OF WRITTEN DOCUMENTS;
ILLUSTRATED BY THE WHITTAKER CASE, &c.**

(Continued from p. 442, ante.)

NEXT I come to Expert Gayler's testimony, as published in the Criminal Law Magazine. (I could not, perhaps, contrive a better way of illustrating what I claim to be the only proper method of arriving at a just conclusion in such investigations, than to give the testimony of the experts in this case so far as it may be necessary to this end, and by comparing, side by side, actual fac-similes of the letters commented upon.) First. "The letter '*d*,'" says Expert Gayler, "in the word '*fixed*,' I found no other example of its use in any of the other writings examined, except in No. 8." (Whittaker's writing, I suppose he means), for he goes on to say, "in all the thirteen papers mentioned (of No. 8), this form of '*d*' is almost invariably used." On plate 1, in the word "*fixed*," this "*d*" is seen, and also in the sixth line of plate 3. The first letter in this group is from the "note of warning," the second two (No. 27), (who, as it was stated at the trial, was one of the cadets at West Point, as I have noticed before), and in whose specimens of handwriting in my possession, it is very common; the fourth is from "No. 8," or Whittaker. Certainly, the second is as much like the first as is the fourth. It seems quite strange that Expert Gayler did not find any "example of its use in No. 27," where it so constantly occurs. It is still further separated

from "No. 8" by the hook with the point to the right, which never occurs in Whittaker's writing. Not one of the experts seems to have noticed this, and yet, if one may quote poetry in a legal paper,

"Oh, the little more, and how much it is,
And the little less and what worlds away."

"Second" (from Gayler), "the letter 'f' in 'fixed' and 'friend' I found no such resemblances in the 'f's' used in any of the other writings examined." On plate 2 line 6 these letters are given from the "note of warning" marked with a star, those from No. 27 with a "J," and those from No. 8 (Whittaker) with an "I;" certainly the two letters in the group marked "J" are made on the same principles as the one marked with a star, while the fourth letter "b" in this line might as well do service for an "f," as the letter which follows it, which is the "f" from the "note of warning" in the word "fixed."

"Third. The "p" in the words "April" and "keep" in the "note of warning" (plate 1).

This form of "p" is almost invariably used by No. 8. On plate 2, line 6, will be found two of these from the "note of warning," also from No. 27 and No. 8. It will be noticed that the backward sweep of the pen which makes the middle loop is carried across the shaft in the first two groups, while in the third it is carried barely to the shaft. I have never found it to cross the shaft in all the hundreds of these letters made by Cadet Whittaker, which I have in my possession. Here certainly is an important fact which connects No. 27 with the "note of warning," while it as *surely* separates No. 8 from it. This peculiarity is not mentioned by Expert Gayler.

"Fourth. "The letters 'th' following the figure 4 in the 'note of warning.' They are very similar to the 'th' habitually used by No. 8." He adds: "It must be noted, however, that the knee of the 'h' is less sharp at the top than No. 8 usually makes it." Had this expert stated what would seem to be the truth in the case, that nowhere in the writing of No. 8 could this letter be found with a rounded knee, he would have done strict justice in the premises. This letter, as made by No. 8, may be seen in the sixth line on plate 2 compared with the same letter from the "note of warning" and from No. 27. On plate 2, it may also be seen in the third line, which consists of a fac-simile signature of

Whittaker. Out of one hundred and fifty of these letters written in both pencil and ink taken without selection, I have not found one that has a rounded "knee."

Fifth. The capital "A" in the "note of warning." Both of these are given in plate 3, and also one from No. 27 and two from No. 8. The second "A" in the group marked "I" is the one alluded to by Expert Gayler as being "used in the date of the Requisition for Supplies." "The formation of the legs of these letters," he tells us, "is similar" (which it is not), as the second "legs" of those from No. 8 curve in an opposite direction from that of the first, and also contrast with the straight line of the second. The first "legs" of these begin with very obvious differences, and the lower "loops" of the one form almost perfect ovals, while in the other these loops swell at the bottom and end off with an acute angle at the top. And in addition to this may be seen the flourishes in the first, and the engraver-like nicety of their whole.

Sixth. The capital "M's." "These," he says, "bear resemblance to those used by No. 8." The first "M" in plate 3 is from the "note of warning," the second from No. 27, the third from No. 8. It is the only form of this letter that I find in any of Cadet Whittaker's writings.

Seventh. This takes up the small "w's," on these I make no comment. They are to be seen in the fifth line, plate 2.

Eighth. The small letter "a." I give those from "the note of warning," compared with as many from No. 27 on plate 3. On plate 4 I give all these from the "note of warning" and the envelope, six in number, seven from No. 27, and twelve from Whittaker's papers used in the case. The first and fourth lines are from Whittaker; the second from the "note of warning," the third from No. 27. In both cases I have selected letters nearest like those in the original document. It would not seem very difficult to say which of the two, No. 8 or No. 27 wrote the second row of letters in this plate. And yet Mr. Gayler says: "In conclusion, I have to report that the writing of No. 8 is the only one among all that I have examined which presented points of resemblance to the Whittaker note, sufficiently strong and numerous to warrant me in recommending the court to pursue its investigation vigorously in the direction of No. 8." In view of the four lines of the letter "a" on plate 4, should not the word resemblance read *non-re-*

semblance, and thus the conclusion be based on the same ground as that expressed in the legal publication before noticed. Or shall we conclude that there is "form blindness" as well as color blindness, and that the experts thus far incur no responsibility for their opinions?

I proceed next to notice the testimony of Expert Southworth. While attending the court in this case, there was put in my hands some fourteen photographic copies of writings, which were designated as No. 27, as I have before noted and stated, to be the production of some one of the cadets at West Point. These are the same writings with which comparisons have already been made. On page 162, Criminal Law Magazine, Mr. Southworth says: "I have no doubt, in my own mind, that the question note" (meaning the "note of warning") "was by the hand that wrote No. 27." If this is the same No. 27 from which I have taken so many of the letters in my plates, it will be seen that for some reason Mr. Southworth subsequently testified quite differently upon this point, for he says, page 152, *Id.*, that he "had been obliged to abandon the ground taken in his former report." This change was brought about by the means of some new papers being brought to his notice. The report goes on further to say: "Without going again into an analysis of the anonymous note, Mr. Southworth pointed out the cross of both the capital 'A's' and the two 'f's' in the questioned note as being *natural* and belonging to the character, &c., when fully made out by the same hand." If we look at these letters on plates 2 and 3, we shall see that the method of crossing these letters is common to all these cases. Why then should it be used to connect the "note of warning" with No. 8, rather than with No. 27? Perhaps the author of the paper in The Criminal Law Magazine may be able to tell us also what he means by the following, on page 170: "While it is the commonest thing in the world to attempt to disguise one's own hand by writing *worse* than he is able, no writer can follow models that are unknown to him, or write *better* than he is able." This is a truism which no one will be so rash as to dispute.

The second capital "S," on plate 3, is made on the same principles as that of the first from the "note of warning;" the next two are Whittaker's. These, with the other letters on the first line of this plate, have been commented on before. The first letter "B" on the second line is from the "note of warning;" the second two

are from No. 27, the third two from No. 8. The second two are exactly like the first in principle, and only differ as respects the bending of the first limb of the letter. The last two differ from the others in being much more angular, in having no open loops in the central portion of the last limb, and in being comparatively of an awkward form. The "Y" has been fully discussed elsewhere. The "F" is given to show the corresponding form of the bottom loop with that of the "Y." The two last capitals in this group show a contrast as to the top loop and the bottom terminal finish. There are seven specimens of this letter "Y" on plate 3, line 5, one from the "note of warning," and three each from No. 27 and No. 8. I call especial attention to these last in reference to the terminal end. This *club shaped* end is very common with No. 27 in this letter and other analogous letters—"g" for illustration; while in Whittaker's writing I have never found it; and when he ends off his letters in this manner, *i. e.*, with the shaft bent at a right angle, the end is *pointed*, as seen in the plate. This seems an important point, for while it connects No. 27 with the "note of warning," it as surely separates No. 8 from it.

The small letters "u" and "un" are to be designated as they are marked, those with a * from the "note of warning," with "J" from No. 27, with "I" from No. 8. The bottom curves of the last limb of the "u" in the first two are remarkably characteristic, while no such broadening or elongation of this curve is seen anywhere in No. 8. The "n" also in the first two are curiously alike. Nothing of the kind can be found in Whittaker's writing. The next line is made up of the letter "a." Their origin is indicated by the characters placed over them. They are fully described in another part of this paper. By a comparison of these letters on this plate (3) we shall again arrive, I think, at a full confirmation of what was said in my first notice of this letter. The letter "d" I have given as it occurs twice in this form in the "note of warning." The first two groups are certainly alike, each to each, as are those in the last group to those in the second. The "ri" is a characteristic form of No. 27. I have never found it in No. 8. The "wo" and "wi" are given as they are found with the two letters connected in this manner in No. 27. It was stated on the trial that such a connection of these letters could be nowhere found in his writings. This was also said of "ou" which is seen in the last line of plate 2. The group marked "J" is

from the word "compounds" in one of the photographs of No. 27, numbered 13. It is from a paper on colors and "The Solar Spectrum." The last line in this plate (3) is from a genuine address on a letter (not from the Whittaker papers) and an imitation of the same in smaller characters. It is given to illustrate to some slight extent what has been called the "rhythm of pressure" in handwriting. It will be noticed in the first or genuine signature that the down strokes for the most part swell at the bottom, while in the other this fact has been evidently overlooked. This constitutes the main difference between the two signatures. It might not be deemed of much value as testimony in the absence of all other facts, but if under this condition we could obtain a good number of different specimens of the same hand and should find this habit to be constant in the down strokes of the letters, I think we should be warranted in placing considerable confidence in our conclusions. There are some other points which might be noticed, such as the difference in the middle loops of the "B," which point in a different direction in the two cases. In this illustration the expert could point out the facts in the case as I have noticed in another connection, and leave the jury to draw their own conclusions without any guidance from him. Under such conditions the idea of the expert favoring either side of a question would of course be incorrect. He would simply give the facts in the case, as would the surveyor in the measurement of a field, or the architect in stating the number and size of the rooms in a building. And even better than these, for he would verify his facts by an actual exhibition of them before the jury.

I next proceed to the examination of plate 2. A part of the letters on this plate have already been described. The first line, "Cadet Whittaker," is from the envelope of the "note of warning." The second is *made up* from the papers of No. 27. The syllable "ade" is from the word "cadet" in one of these papers. The "hi" and "tt" with the single letters were taken from the writing of No. 27. They were drawn, as were all the others, under the microscope, and reduced by means of the photographic process to their present size and copied at the same time on the wooden block, thus giving an almost perfect representation of the originals. If we compare the two "Cs" in the first and second signatures, and the first four capital "Cs" in the third line, and the first five small letters "c" in the fifth line we can hardly escape the

conclusion, I think, that they all belong to the same family, that of No. 27. The first "C" in the third line, the last three in the fourth, and the last four in the fifth, are *known* to belong to one family, that is they are Whittaker's production. To which of the families do the two forms marked with a * which are duplicates of each other belong? The two capitals "W," marked thus * are from the "note of warning" and the envelope. The next two are from No. 27. The last two from Whittaker's papers No. 8. As in every other case I have selected letters for comparison nearest in form to those of the same kind in the "note of warning." The signature in the third line is selected on the same principles. The second and third "b" on the sixth line of this plate are at least as much like the first from the "note of warning" as are the two marked "I" from No. 8. The fourth and fifth letter "b" and "f" on this line have been before noticed on account of their similarity of form, so that either would serve to do duty as one and the same letter. It would certainly seem as if they must have been made by one and the same hand. The "xe" on the seventh line is from the "note of warning." The second "xe" from No. 27 shows a similar method of joining this letter "x" to the succeeding letter. The other letters "x" with their connections in this plate, four in number, are all the forms of this letter I have found in Cadet Whittaker's writing. It would seem that if he had used the form seen in the "note of warning" it certainly must have occurred at least once in the numerous documents in his handwriting which I have in my possession. The three last letters on this plate show some marked contrasts of form.

On plate 5 the name "Whittaker" occurs three times. Two of the signatures on this plate, the first and third, are from Expert Hagen's plate, given as fac-similes of Whittaker's writing, and used as evidence in the last trial. The second is from the "note of warning." I have already compared the letters constituting the "note of warning" with similar letters from Whittaker's own papers. These examples, as well as those constituting the first two rows in this plate, are given as illustrations of the "standards" on which Expert Hagen based his conclusion that the person who wrote No. 8 was the same "person who wrote the contents of the note addressed to Cadet Whittaker;" and this in spite of the fact that he must have had the very same papers which I have noted as No. 27.

It will be remembered that Expert Gayler, in summing up his testimony, said: "It must be noted that the knee of the "h" is less sharp at the top than No. 8 usually makes it." This distinction is very clearly seen here. It does not seem to have been noticed by Mr. Hagen, or at least to have been thought of any value; and so of the bottom turn of "h" and the following "i." Here the same important distinction seems to exist. Notice also the letters "h" and "k" in these signatures. To say nothing of the entire difference of shape in the last letters; in the first (Whittaker's) the ink stroke is much the heavier in its last third, while in the "note of warning" the heaviest part of the letter is where the up line crosses the shaft. The "i" is also separated from the "t" in the second example, and the "t's" have solid tops in both cases, while in the "note of warning" one has an open top. There is also a very marked and important distinction in the crossing of these letters. In the one the initial portion of the stroke points distinctly upwards and the terminal portion downwards, while in the other the reverse is the fact, and moreover, in the last the crossing stroke begins heavy and grows lighter at the terminal end. This seems to be universally the fact in Cadet Whittaker's writing, whether of pen or pencil, when the crossing line is made as a single unconnected stroke, as seen in these two cases, while in the writing of No. 27 the analogy of equal thickness of stroke is everywhere to be seen. There is also a marked difference between the terminal letters "r" in the three signatures. The general aspect of the two hands, as seen in these chosen examples, is quite different. I do not allude to the comparative roughness of outline, as this is dependent upon the fact of the one being photographed from a penciled original, while the other two are copies from Mr. Hagen's plates, written in ink as I suppose. Be this as it may, he has chosen to give them as exhibits on which his conclusions were based, as I have noticed above. It would seem, from this view of the subject, that one could hardly help coming to the conclusion that his opinion was based upon the same ground as that of the other witness before mentioned, that No. 8 must have been the author of the note in question on account of its being written in a hand entirely different from his usual style.

In the last line of writing on this page is shown a method of presenting facts by which any person, however innocent, might be

convicted of any crime whatever, involving or depending upon such facts as testimony. The letters marked with a star are from the "note of warning;" the others are from a so-called "fac-simile" of this note given in the Criminal Law Magazine, pp. 147, 148. I need scarcely call attention to these letters to show how entirely they differ from those they claim to represent. The "C's" for illustration—what a caricature it is of the original! and of the others it would seem as if the intention was in thus changing them into a pointed hand to bring them nearer to Whittaker's, which is in contrast in this respect to the disputed note. Here we have made objective, what in the testimony I have noticed is clearly subjective, I think, and which is based in part upon the inability to take note of differences and resemblances of form, as is the case of some persons with regard to color. I cannot well understand the facts under consideration in any other manner; for Mr. Hagen's "fac-similes" are fairly well made, while these are, as we see them, and still the same conclusions have been arrived at in both cases. And further, these so obviously incorrect conclusions may have grown out of the want of a proper arrangement of the letters thus compared, so that they could be seen side by side with each other. In the comparison of handwriting it is simply, as I believe, impossible to carry in the mind to any great extent the forms of letters, so as to distinguish them from each other, where there is any marked similarity, and especially if these differences (which is very liable to be the case in attempted forgeries of documents) are of so minute a character as to require a microscope to detect them. By reproducing the magnified images, and placing them side by side, this difficulty may be overcome. On page 166, of this same Criminal Law Magazine, is a diagram which, with the alleged facts connected with it, I proceed to notice in this connection, as they have gone out to the world as evidence in this trial.

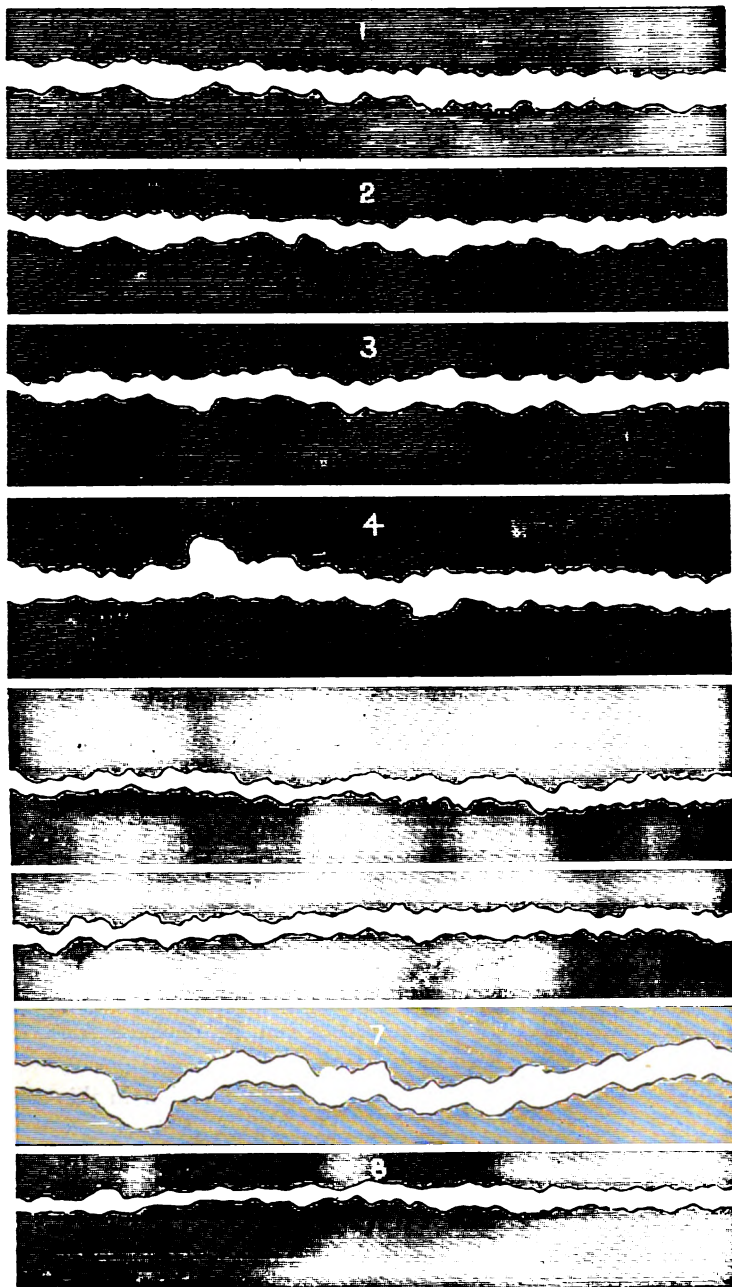
The diagram is made to represent the half of a sheet of letter paper which has been divided (torn) into three pieces for certain specified purposes; on one of these pieces it is said the "note of warning" was written, while the other two were used for purposes which were not brought under my notice for examination. If the diagram is intended to convey a correct idea of one of the facts in the case, *i. e.*, the relative size of the different pieces of paper which constitute the entire sheet, it fails to do so, as it entirely

misrepresents the matter in this respect. A sheet of this paper, as I measured it, contains, as is the fact with many other samples of paper of this form, over one hundred and sixty (160) square inches of surface; a half sheet some eighty (80) square inches. Now the "note of warning" is represented in this diagram as occupying more than one-third of the area of the half sheet, that is at least thirty square inches. The "note of warning" itself measures three and two-tenths (3.2) inches by two and six-tenths (2.6) inches, giving an area of eight and thirty-two one hundredths (8.32) inches. There is nothing in the text of this paper to show that the diagram alluded to was not intended to correctly represent the original. It is, therefore, at least as fair to say of it that it goes as far in this direction as does Mr. Southworth's testimony, which was based upon the relation of facts which it professes in part to set forth.

Expert Southworth says (Criminal Law Magazine, pages 165-6): "I have a sheet of paper from which the paper on which the anonymous note is written was torn. The fact is easily discernible to ordinary vision with the naked eye." Again. "The torn edges of the paper in two places, the ruling and the machine cut at the original transverse edge, it was apparent without any microscope, fitted exactly."

Here are three facts mentioned, only one of which, nor that, indeed, necessarily, goes to connect Cadet Whittaker with the authorship of the "note of warning." The fact that the ruled lines "fitted" could not well help to be so, as the paper was the same manufacture as is used by the other cadets at West Point, and the "machine cut," if it means anything, goes to the same end of showing that the paper was of the same manufacture as that in the hands of the other cadets, and that, therefore, not one of them would have had any trouble in this direction in producing the note in question. The question then only remains: did the "torn edges of the paper fit" so as to be "easily discernible by the ordinary vision," or, indeed, was there any proof whatever in this respect, that they fitted at all. On the contrary, did not the facts in this connection all tend to show that no such union as is here alleged ever existed? I certainly examined the originals with great care, both with the unaided eye and with magnifiers, and came to this last conclusion. Further, there were placed in my hands, at the trial, photographs of the pieces of paper in juxta-

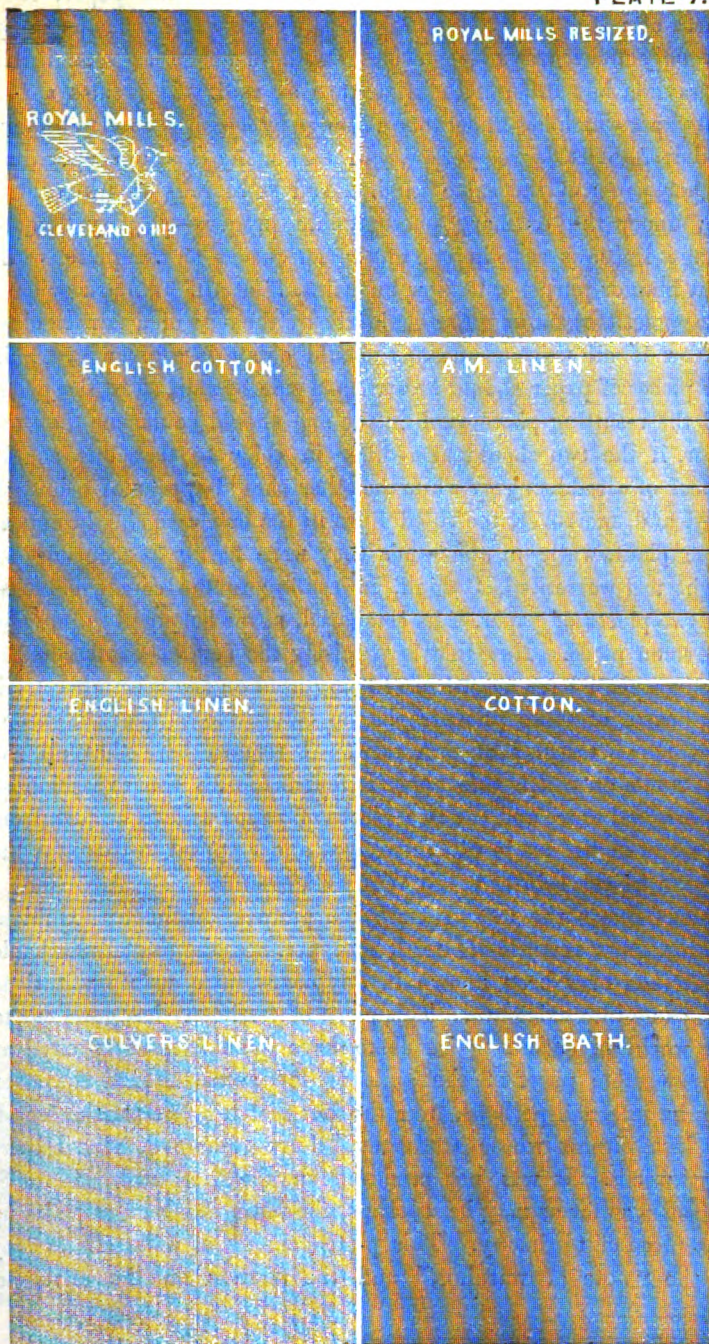
PLATE 6.



position as described by Expert Southworth, and these viewed by the unaided eye and also by the help of the microscope, fully confirmed this conclusion. The photographs alluded to were "Southworth's, Diagram C, No. 3." I made careful drawings of the torn edges of the paper, as shown by these photographs, under the microscope, and testified on them at the trial. Since then I have gone over the whole ground again, and hereby exhibit the results in plate 6. The first, second, third and fourth diagrams of plate 6 are from the papers described, showing the value of Mr. Southworth's statement, where he says: "An inserted spot (indentation) on one edge has its corresponding tooth opposite." The magnifying power in these cases is about seven diameters, hence, one of these strips represent the length of half an inch of the edges of the original documents. The lower diagram (No. 8) is from the "note of warning" (and the piece of paper from which it was divided, as testified by Mr. Southworth. It was copied from the photographs, as described above.) It is magnified some five diameters, and shows about three-fourths of an inch of the torn edges of the paper. The remaining three diagrams (5, 6, 7) are from actual experiments on two kinds of paper, No. 5, legal cap, Nos. 6, 7, linen paper torn in two directions. These specimens were torn under precisely the same conditions by the side of a metallic plate; the magnifying power was the same as in the first four specimens. It will be seen by this, I think, that some evidence of the fitting of the torn edges of paper should be shown, in order to render such testimony of any value in the courts. There is a method by which paper can be torn so that different kinds may be made to fit as well as in the genuine experiments shown in diagrams 5, 6, 7. Hence, in the absence of other testimony corresponding with it, such fitting of edges could be deemed of but little value. What should be said in this case then where it can be shown to a demonstration that the edges of the specimens in question could not, so far as anything can be deduced from the appearance, have ever been united?

There is one other fact which I proceed to mention in this connection, as it relates to my general subject, I have given a plate (plate 7) illustrating this subject, as far as this can be done by means of an engraving. It consists, in the main, in the results obtained by exposing, at the same time and under the same conditions of arrangement, certain substances regarded or seen as

PLATE 7.



similar, to the photographic process. Thus, white paper, from pieces of which mounted on other paper the plate is made, shows not only differences of color and depth of shade, as seen in the engraving, but differences of texture as well. It is also a fact that paper which has undergone a change by keeping, so as to become in the slightest degree yellow, will take many shades deeper than fresher paper of the same kind. And so of inks used in ruling, &c., under the ordinary photographic process—*e. g.* yellow or orange lines, as seen in one of the specimens on the plate, while light blue or purple will show but faint, if at all. A dark or deep blue sometimes shows quite distinctly by the side of a fainter blue.

Now if all these conditions should obtain in a given case; if two pieces of paper should be arranged side by side, as in the plate, and the resulting photograph in the one should be darker than the other, if the two should also differ in color so that one should appear of a reddish grey while the other should appear of a blueish grey, and, moreover, the ruled lines in the one case should appear quite plain, while in the other they were hardly perceptible, we might feel warranted, I think, in coming to the conclusion that the two pieces of paper, thus compared, never belonged to one and the same piece. Now this is precisely the fact in regard to the photographs I have described as being used on the Whittaker trial. Duplicates of these photographs lie before me as I write, on one of which I testified at that trial. I remark here that all the documents on which this paper is founded, with the exception of the original note, and the two pieces of paper said to be torn from the same sheet, are in my possession, and I appeal to them for the substantial correctness of all of my statements.

Next comes the most remarkable piece of testimony exhibited in this most remarkable trial, and perhaps the most remarkable which has ever been known in any court since such institutions first came into existence. This piece of testimony has gone out to the world in such a guise as to have been frequently cited as unanswerable proof of the guilt of the accused. Its character may be inferred, perhaps, from the fact that it is the production of the last witness whose testimony I have examined, *viz.*, Expert Southworth. It was not produced on the first trial. Plate 8, embodies as far as may be, perhaps, the ideas which go to make up this piece of testimony. This plate consists of a fac-simile copy of the "note of warning," and the address on the envelope,

PLATE 8.

Sunday — April
 Mr. Whittaker
 Beller keep
 April
 (Other illegible cursive text)

together with other writings on the same papers, professed to be as brought out by Mr. Southworth on enlarged photographs of these papers. On the original "note of warning" and the envelope, no such writing could be seen either by the unaided eye, or by means of the microscope. Neither could it be seen on photographs of these papers which were made of the same size, or nearly the same size as the originals; but when magnified three diameters, that is, nine areas, according to Expert Southworth, this underwriting is

plainly visible. Now, on these enlarged photographs, the original writing on the note and envelope appears nine times as large as on these papers themselves, while this *underwriting* is mainly of the same size on these enlarged photographs as that on the original papers in their normal size. Thus, the original letters, as seen on these photographs, appear of gigantic size by the side of the underwriting which is of normal size, so, that when Mr. Southworth's tracing is reduced to its original size, as it was when both the underwriting and overwriting was made, we find that a good deal of the underwriting is microscopic in its character. Mr. Southworth's theory is that Whittaker practised this underwriting as a preparatory exercise previous to producing the note and envelope; that this underwriting was in pencil, as was the note; and that it was rubbed out, and afterwards the note itself written on the same paper. Had so foolish a scheme as this been put into execution, the note being written as it was on ruled paper, it will be at once inferred that in the operation of rubbing out the pencil-marks, the ruling would have been as surely obliterated. This was found to be the fact by repeated experiments, once in the presence of the court and under their direction. In this case some of the "West Point paper" (ruled) was taken and penciled over with a soft pencil, to the extent and in the manner directed by the court. Next, the pencil-marks were removed by means of India rubber, when it was found that the ruled lines had also disappeared. These lines were intact on the original note, and also show as I have before stated on the photographs made from this note.

The above facts alone would seem to amount to a demonstration that this whole piece of testimony was but the production of the imagination. If such hallucinations are to be received at all, as testimony in any court, surely, as here set forth, the jury would be as competent to arrive at a conclusion in regard to it as the expert witness, whose province it is thus to state it. It may be well to notice here that the faculty of being able to see, or imagine the presence of letters and other forms on irregularly darkened paper surfaces, as produced by the photographic process, &c., is common enough as I have found by actual experiment. In the present case, I, myself, with others, could trace the appearance of writings on Mr. Southworth's photographs. But no two individuals, when making these tracings by themselves, would see the same letters; nor would they seem to be in any recognisable hand. In some

cases grotesque images would appear, mingled with forms of letters and other objects. The strange fact in the matter is, that any one should have once thought of using this "stuff, of which dreams are made," as testimony in any case.

I ought perhaps to add, as a further illustration of this matter, a description of what I showed on the trial, *e. g.*, an enlarged photograph of a clean piece of paper of a slightly yellowish aspect, on which I had made some lines of writing. Of course, as in the photograph of the "note of warning" which I have been discussing, these letters appeared enlarged in the same proportion as the paper itself. On this paper I myself, as well as several other persons to whom I submitted it, could trace letters and various other forms precisely as we could do on Mr. Southworth's enlarged photographs as before stated. These "imaginary" letters appeared, as in his case, of the normal size, and had the paper with the genuine and imaginary writing been reduced to its original size of course this *underwriting* would, as shown in the plate, appear of a *diminished size*, as must have been the fact had it existed on the paper previous to my executing the "lines of writing" as stated above.



PLATE 9.

Plate 9, illustrates the fact that letters written in pencil may be made to appear quite different on photographs taken before and after the pencil dust has been moved by rubbing. The single "p" in the group is a magnified reproduction of the letter in the word April on the photograph of the "note of warning" furnished me early in the case, as I have mentioned before. The other "p" is from a later photograph presented to the court by the judge advocate as showing that this letter was of different form from my

PLATE 10.



representation of it. It is an exact reproduction of this letter as seen in this photograph, a copy of which I have in my possession, it being the one on which I testified. All the letters on this photograph, with the exception of this, appear as clean in their open spaces as does the "A" in this plate. This fact joined with the other that in my first photograph this letter is thus clean, shows to a demonstration that this letter must have been somehow changed between the times of taking the two photographs. In my examination of the original note I could clearly see that this letter had been rubbed as I have described. And, further, under the microscope, even on the photograph, the original lines can be distinctly seen as exhibited in the plate. I do not know that this fact had much bearing on the case. It seemed as if it were deemed of importance by the manner in which it was presented to the court. It certainly should be placed, I think, in the same category as all the other testimony I have thus far examined in this case.

My tenth plate is made to show how, under the microscope and in the hands of a skilful engraver, a letter may be so copied as to represent every appreciable fact connected with it with the exception of color. Thus, heavy or light lines, crossing lines, the one under or over, which frequently becomes an important question in these cases, and other facts as shown in my plates. The three large drawings of letters in this plate are made from the small one under the microscope on three separate times. They have been transferred directly on the wood block, and are in the true sense of the term actual fac-similes of the originals. These enlarged images also serve to show how under the microscope every form and feature of a letter, however small, may be brought out and placed in a condition, as I have before said, so that the court and jury in a given case may be as well qualified to decide the value of such testimony as the expert himself whose province it is thus to present it.

I wish to acknowledge here the care and skill of Messrs. Baker & Co., who have enabled me to present such perfect fac-similes of my original illustrations.

R. U. PIPER.

RECENT ENGLISH DECISIONS.

High Court of Justice, Chancery Division

WILLIAMS v. WILLIAMS.

A man cannot dispose of his body by will ; it is the executors' duty to bury it, and they have the right to possession of it in the meantime.

Testator gave his body to the plaintiff, who was not an executrix, and gave her directions for cremating it. The relatives would not permit this, and with the consent of the executors buried the deceased, he being a Roman Catholic, in the unconsecrated part of a cemetery. Afterwards the plaintiff applied to the Home Secretary for a license to remove the body, which was given on the understanding, implied from the plaintiff's letters, that the body was not to be cremated, but was to be buried in consecrated ground. The plaintiff took up the body, burnt it, and then brought an action against the executors to recover the costs of so doing: *Held*, that she could not recover ; as (1) the gift of the body was bad in law and void ; (2) the removal of the body, being done under a license which was given for a purpose other than that for which it was used, was illegal ; and (3), even if it were not an illegal act, it was, at all events, a fraud upon the license, and a court of equity would not entertain a claim arising out of it.

THIS was an action against the executors and residuary legatees of one Cookenden, to recover costs incurred by the plaintiff in cremating the body of the testator.

The testator made his will in December 1868 ; and in May 1874, he, by a third codicil, appointed the defendants, Williams and Davenport, executors and trustees.

By a fourth codicil, dated April 12th 1875, he directed that three days after his death, or as soon as convenient, his body should be given to the plaintiff, to be dealt with by her as he had directed in a letter to her. He then gave her a Wedgwood vase, to be used for the purpose directed by the letter, and directed that the costs incurred by her in performing the instructions contained in the letter should be paid by his executors, on production of account and vouchers, within three months after his death.

The letter was written on the 28th of March 1875, and contained instructions as to the burning of his body and the disposal of the ashes.

The testator died on the 21st of December 1875 ; on the 23d he was buried by his nearest relatives, of whom the plaintiff was not one, but only a friend. The executors concurred in and were present at the funeral. The plaintiff protested against it, but to no purpose, and she was present at it. The testator, being a Roman Catholic, was buried in the unconsecrated part of the Brompton

Cemetery, but the grave was consecrated according to the rites of that church. On the 3d of March 1876, the plaintiff wrote to the Home Secretary, telling him of the codicil and letter, and asking for leave to remove the body for the purpose of having it burnt or placed in consecrated ground. In answer to this she was told that permission to remove the body for cremation at that time after burial could not be given, but was asked to what burial-ground she proposed to remove it. In answer to that she wrote, saying nothing more about cremation, that she intended to take the body to a certain churchyard in Wales. The plaintiff then got a license, under 20 & 21 Vict. c. 81, to remove the body "from the grave in which it is interred in the unconsecrated portion of the Brompton Cemetery." She informed the executors that she intended to cremate the body as soon as she could; but she did not actually exhume it till March 1878, when she sent it to Milan, and had it burnt. The ashes were sent back and buried in consecrated ground. She then demanded payment of the costs of thus dealing with the body, 321l., and, on being refused, brought this action.

Higgins, Q. C., and *Laing*, for the plaintiff.—The codicil and the letter between them made a complete disposition, although the letter was not admitted to probate: *Quihampton v. Going*, 24 W. R. 917; *Bizzey v. Flight*, Id. 957; L. R., 3 Ch. D. 269. [KAY, J.—Is this bequest of a body valid? In *Reg. v. Sharpe*, 5 W. R. 318, 7 Cox C. C. 214, Mr. Justice ERLE says that our law recognises no property in a body.] It seems that the person who has possession of the body has the duty of burying it: *Reg. v. Stewart*, 12 Ad. & E. 773. The plaintiff had possession by virtue of the license; you cannot go behind that. [KAY, J.—It is the duty of the executors to bury the deceased: *Williams on Executors*, 8th ed., p. 972. I want authority to show that a contrary disposition can be made.] The plaintiff was executrix for this purpose. The directions were not against public law.

W. S. Owens, for the defendant, Williams, took no active part in the action.

Rigby Q. C., and *Popham*, for the other defendants.—The executors are the only persons who have any right to the possession of the body: *Reg. v. Fox*, 2 Q. B. 246. These directions are like

directions to keep up a tombstone, which are not void: *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255; but are honorary trusts only: *Dawson v. Small*, 22 W. R. 514, L. R., 18 Eq. 114. There is no positive law as to the illegality of cremating, but it is against our general law. It is an indictable offence to take up a body: *Rex v. Lynn*, 2 T. R. 733. The license was not given for the purpose for which it was used.

Higgins, in reply.—Cremation cannot be said to be indecent or offensive to morals, as in Cripps' Laws of the Church and Clergy, 5th ed., p. 776, it is spoken of as an ancient and widely diffused mode of burial. The class of cases referred to were all directed against "body snatching:" Russell on Crimes, 5th ed., vol. 1, pp. 611-620. The sum spent in carrying out the testator's wishes, as we considered ourselves bound to do, is not too much, considering what was to be done, and the value of the estate: *Stag v. Punter*, 3 Atk. 119. Your lordship has relieved me from considering the question of the three months' limit in which the expenses were to be demanded.

KAY, J.—It is clear that there can be no property in a human corpse. In *Reg. v. Sharpe*, which was a case of an indictment for digging open a grave and removing a corpse from it, the defendant's family were Dissenters, and his mother was buried in a burial ground of that sect, but his father being recently dead, he wished to remove his mother's remains to the place where he intended to inter his father; he then got leave to open the grave, under pretence of wishing to see whether it would hold his father's coffin, took out his mother's remains and carried them away. The court, though it gave him credit for having acted with good motives, affirmed the conviction. Mr. Justice ERLE, who delivered the judgment, said that the defendant had wrongfully opened the grave, as the license he had was given him for a different purpose from that for which he had used it; and, also, "that our law recognises no property in a body."

The next question is, What is the duty of the executors as to burial? In Williams on Executors, at p. 972, it is stated that it is their duty to bury the dead body in a manner suitable to the estate which the testator left behind him. It is said that that only means that they are responsible as to the expenses, but it seems to

me to mean that the persons who are responsible for the actual burial of the body are *prima facie* the executors.

It is, moreover, shown by *Reg. v. Fox*, following *Reg. v. Scott*, reported in a note to it, where a peremptory *mandamus* was issued to a gaoler, who sought to retain the body of a prisoner until certain claims he had against him were satisfied, ordering him to deliver the body to the executors, that the executors have the right of possession and custody of the corpse until burial.

It follows from these cases that a man cannot dispose of his body by will. I asked whether there was any authority contrary to that, and I have been referred to none. Accordingly, the direction in the codicil that the testator's body was to be delivered to the plaintiff, who is not an executrix, is bad in law and void. She had no property in the body, and could not have enforced delivery of it to her.

The purpose named in the letter cannot make the gift either better or worse, but it was confessedly for cremation, and a question might arise whether that was legal according to the law of this country. That question, however, I shall not now decide.

There are still two other questions, the answers to which are equally fatal to this claim. I preface my remarks upon this part of the case by saying that I have no doubt that the plaintiff thought she was bound to carry out the testator's wishes, and I absolve her from any intention to act illegally or *contra bonos mores*. But it seems to me evident from the letters between her and the Home Office, that the license was given, not for the purpose of cremation, but on the understanding conveyed by the plaintiff's letter, that it was to be used for the purpose of removing the body to consecrated ground. Yet, notwithstanding that representation, the plaintiff expressed to the executors her intention of carrying out, and did carry out, her original design of cremation. I have no hesitation in saying that that act was illegal, and if the Home Secretary had known sooner of the plaintiff's intention he would have prevented it by revoking his license, as he did when it was too late. Moreover, the court would have restrained it by an injunction, if the executors had applied to it to do so. It has also been argued that it was a misdemeanor, but I need not decide that now.

If that was the only question, it would prevent the plaintiff from recovering the money. But even supposing the act was not an illegal one, could any one come to a court of equity to recover ex-

penses incurred about such an act as this, an act which was, in fact, a fraud on the license? Such a claim could not be entertained for a moment.

This action, in my opinion, fails entirely from any one of the reasons which I have given, and I, therefore, dismiss it with costs.

Action dismissed.

The questions involved in this case are both novel and interesting. The case, so far as relates to the right of a person to direct the disposal of his body after death, appears to be one of first impression. Cases relating to conflicting claims of the rights of custody between different relations, after burial, are not uncommon. There are also some *dicta* in this country which would seem to recognise the right of a person to provide by will for the disposition of his body, but the point does not appear to have directly arisen in any case, and no authorities are cited to sustain such *dicta*. Even those *dicta* do not afford any countenance to the doctrine that the body can be otherwise disposed of than by burial. See *Pierce v. Swan Point Cemetery*, 10 R. I. 227, per POTTER, J.; Report of Hon. Samuel B. Ruggles, 3d conclusion, 4 Bradf. Sur. 503. And see *Loury v. Plitt*, 16 Am. Law Reg. N. S. 155 and note. Almost without exception the authorities lay down the rule, as stated in the principal case, that there can, at the common law, be no property in a dead body: 2 Black. Com. 429; 2 East Pl. Cr., ch. 16, sect. 89; *Guthrie v. Weaver*, 1 Mo. App. 141, 143; *Meagher v. Driscoll*, 99 Mass. 284; *The Matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155, 178; *Reg. v. Sharpe*, 1 Dears. & Bell 167; s. c. 7 Cox C. C. 214. There can be no property in a corpse; and, therefore, stealing it is no felony, but a very high misdemeanor. In the case of *Dr. Handyside*, where trover was brought against him for two children that grew together, Lord Chief Justice WILLES held that

the action could not lie, as no person had any property in corpses: 2 East Pl. Cr., ch. 16, sect. 89.

In *Pierce v. Swan Point Cemetery*, 10 R. I. 227, POTTER, J., said: "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feeling of mankind to be discharged by some one towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation; it may, therefore, be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such a case. * * * But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it as a sacred trust for the benefit of all who may from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody, if improperly managed. So, in the case of custody of children, certain persons are *prima facie* entitled to their custody, yet the court will interfere to regulate it.

"We think these analogies furnish a rule for such a case, and one which will probably do most complete justice, as the court could always interfere in case of improper conduct, *e. g.*, preventing other relatives from visiting the place for the purpose of indulgence of feeling, or tea-

tifying their respect or affection for the deceased."

With reference to the same subject the Hon. Samuel B. Ruggles, referee, in the Matter of the Widening of Beekman street, 4 Bradf. Sur. 503, 529, said: "It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable market value of a corpse, or its remains, as an article of traffic, but it is of the *sacred and inherent right to its custody, in order decently to bury it, and secure its undisturbed repose.*" In the same matter, among other conclusions, he laid down the rules, "that the right to bury a corpse and to preserve its remains, is a legal right which the courts of law will recognise and protect;" and "that the right to protect the remains includes the right to preserve them by separate burial, and to select the place of sepulture, and to change it at pleasure."

In the case of *Bogert v. The City of Indianapolis*, 13 Ind. 134, 138, PERKINS, J. (without citing any authority, and not speaking for the court, and the point not being necessary to the decision of the case), laid down the proposition "that the bodies of the dead belong to the surviving relatives, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated. They cannot be permitted to create a nuisance by them." This dictum is, however, so contrary to the natural sentiments of human nature, and so entirely opposed to the current of judicial opinion upon the subject, as to be without any weight whatever. In *Guthrie v. Weaver*, *supra*, the much more rational rule is laid down that the relatives have in regard to the dead body only the right of interment.

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A creditor cannot legally arrest or detain and prevent the burial of the dead body of his debtor until his debt is paid: *Matthews on Executors* 72; *Jones v. Ashburnham*, 4 East 465, per ELLENBOROUGH, C. J.; *Reg. v. Fox*, 2 Q. B. 246, cited by the court in the principal case.

It is the duty of the executor or expected administrator to bury the deceased: *Hood on Exr's* 34; *Wynkoop v. Wynkoop*, 42 Penn. St. 300. And a conspiracy to prevent a burial is indictable at common law: *Hood on Exr's* 35; *Matthews on Exr's* 72; *Rex v. Young*, cited in 2 Term R. 734. The absolute duty of an administrator to bury terminates, however, with the burial, and no subsequent expenses would be a legal charge upon the estate of the decedent, whether solvent or insolvent: *Wynkoop v. Wynkoop*, 42 Penn. St. 293. So universal is the right of sepulture, that the common law, as it seems, casts the duty of providing it, and of carrying to the grave the dead body, decently covered, of any person dying in such a state of indigence as to leave no funds for that purpose, upon the person under whose roof the death takes place; for such person cannot keep the body unburied, nor do anything which prevents Christian burial; he can not, therefore, cast it out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and for the same reason, he cannot carry the dead body uncovered to the grave: *Reg. v. Stewart*, 12 Ad. & El. 773, per DENMAN, C. J.; *Wynkoop v. Wynkoop*, 42 Penn. St. 300, per READ, J.

It being conceded that there can, at the common law, be no property in a dead body, in the ordinary sense of the term, but only a *quasi* property; or more definitely, a "sound and inherent right to its custody in order decently to bury it, and secure its undisturbed repose," the question arises how is this

right to be protected? Questions have not unfrequently arisen respecting the burial place of the dead, and nearly all the cases are of that nature. In such cases the equitable jurisdiction of the courts has usually been invoked. See the remarks of POTTER, J., in *Pierce v. Swan Hill Cemetery*, already quoted. In the same case it is said that, in such cases "no common-law action could avail much. The owner of the lot might have trespass *quare clausum*, &c., but he could only recover damages in money. He might have an *actio* of detinue for the body, or so much earth, &c., taken away; or, perhaps, might have replevin; * * * but it is easy to see that neither form of action affords a sufficient remedy, or could, with any certainty, restore the body to the proper custody. Equity only can give a full and complete remedy, and we think the jurisdiction is fully adequate to it." It is more than doubtful whether replevin or detinue will lie. See *Guthrie v. Weaver*, 1 Mo. App. 141. It is believed that no case can be cited directly holding that either will lie. It seems clear that trover will not lie. See 2 East P. C., ch. 16, sect. 89, *supra*. The right of sepulture in England is a common-law right, but the mode of burial is a subject of ecclesiastical cognisance: *Rex v. Coleridge*, 2 B. & Ald. 806. "It is to be observed that in every sepulchre, that hath a monument,

two things are to be considered, viz.: the monument, and the sepulture or burial of the dead. The burial of the *cadaver* (that is *caro data vernibus*), [*a cadendo*] is *nullius in bonis*, and belongs to ecclesiastical cognisance; but as to the monument, action is given (as hath been said) at the common law for defacing thereof." See 3 Coke's Inst. 203.

"All matrimonial and other causes of ecclesiastical cognisance, belonged originally to the temporal courts (*vide* the case of Legitimation and Bastardy, Sir J. Davies's Rep. 140, and his argument in the case of *Præmunire*, id. 273); and when the spiritual courts cease, the cognisance of such causes would seem, as of course, to revert back to the *lay* tribunals." Per KENT, Ch., in *Wightman v. Wightman*, 4 Johns. Ch. 343, 347. As we have no ecclesiastical courts in this country, burial rights, such as are applicable to our condition, must, if enforced at all, be enforced by the temporal courts, and, as already stated, courts of equity are the only ones that can give full and complete relief. See, generally, the report of Mr. Ruggles, above cited. See also *Fox v. Gordon*, 11 Weekly Notes Cases 302.

From every point of view the principal case seems founded both upon principle and authority.

MARSHALL D. EWELL.

Chicago.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

HUNTER v. MOUL.

The mere acceptance from a debtor of his own note or the note of a third person, on account of an antecedent debt, is not a payment of such debt, but in the absence of a special agreement must be considered as conditional payment or as collateral security.

When the transfer of a note is a conditional payment it is necessary to inquire what the true condition was, and if not fulfilled by the person accepting it what injury, if any, has resulted from the breach.

If the debtor transfer the note by delivery only without endorsement he is not within the strict rule of the law merchant requiring notice of non-payment, and is only relieved from his original indebtedness by the absence of such notice, so far as he can show actual damage by laches of the creditor.

The fact that the creditor upon non-payment of the note, accepted from the maker in lieu thereof a draft, which was subsequently also protested, will not relieve the original debtor unless a loss resulted to him by reason of such exchange.

APPEAL from a judgment entered on the report of a referee. The important facts found by him are substantially these: Hunter was indebted on book account to Moul in the sum of some \$1100 or \$1200. On being asked for payment, he replied he had no money, but had the promise of a note of \$900 from Camp & Randell, payable in four months, and he would give that to Moul to get discounted and use the money. The latter answered he did not want the note, but that Hunter should get it discounted and give him the money. To this Hunter replied that he was a stranger, and could not get it discounted, but Moul should take the note and get it discounted, and he, Hunter, would stand for it and see it was paid. Moul assented to this. The note was made payable to him and sent to him. It was not endorsed by Hunter. Moul had it discounted at bank and received the proceeds. When it matured, it was protested for non-payment, and taken up by Moul. In lieu thereof, and soon thereafter, Moul took from Camp & Randell their two drafts of \$450 each, payable at twenty and thirty days respectively, and wrote Hunter, informing him of the fact, but received no answer. The draft first falling due was paid at maturity, the other was protested for non-payment, and Moul wrote Hunter, informing him thereof. This draft remained in the hands of Moul. Treating it as no payment, he sought to recover of Hunter on the original account, a sum equal to the amount of the draft.

The contention before the referee was whether the circumstances under which Moul took the note, or his subsequent action in relation thereto, compelled him to apply it as a payment on the account against Hunter. There was no express agreement to accept the note as payment, nor to give time for the payment of the account. The referee found that the note was not taken by Moul as absolute payment of so much of the indebtedness of Hunter, and technically not as collateral security therefor, but, inasmuch as paper so held has been called collateral by the courts, he treated it as such. He further found Moul was guilty of no negligence in failing to collect the note, and that he did not so convert it to his own use as to bar

his right to recover of Hunter, and awarded judgment in favor of Moul, from which judgment Hunter appealed.

The opinion of the court was delivered by

MERCUR, J.—The mere acceptance from a debtor of his own note, or the note of a third person, in case of an antecedent indebtedness, is not a payment of the indebtedness. In the absence of a special agreement, it must be considered as a conditional payment or as collateral security. The debtor continues liable for his own debt in the event of a failure of payment of the note thus given or transferred: *Leas v. James*, 10 S. & R. 307; *McGinn v. Holmes*, 2 Watts 121; *Weakly v. Bell*, 9 Id. 273; *McIntyre v. Kennedy*, 5 Casey 448; *Brown v. Scott*, 1 P. F. Smith 357; *Logue v. Waring & Co.*, 4 Norris 244.

When the transfer of a note is a conditional payment, it is necessary to inquire what the true condition was, and if not fulfilled by the person accepting it, what injury, if any, has resulted from the breach. The cases are not in harmony as to the effect of a failure to present the note of a third person, and give notice of its dishonor, when no injury therefrom has resulted to the debtor. We shall not attempt to review them, but refer to some which we think correctly rule this case. Great regard must be had to the character of the transaction. If the debtor endorse the note, a more stringent rule prevails as to notice than if he transferred it by delivery only. When the guarantee is absolute, that a specific act shall be done by another, it was said in *Vinal v. Richardson*, 13 Allen 521, demand and notice need not be averred, although the want of them may be a defence on the ground of negligence to the extent of the resulting injury. One who has merely guaranteed it, but whose name is not on the bill or note, is not in general entitled to notice of non-payment: *Chitty on Bills* 498. So on page 441, it is further said, in general if the bill or note be given as collateral security, and the party delivering it were no party to it, either by endorsing or transferring it by delivery when payable to bearer, but merely caused it to be drawn or endorsed or delivered over by a third person as security, or has merely guaranteed the payment, it has been considered that he is not within the custom of merchants an endorser or party to it, so as to be absolutely entitled to strict regular notice, nor discharged from his liabilities by the neglect of the holder to give him such notice, unless

he can show by express evidence, or by inference, that he has actually sustained loss or damage by the omission. The reason is, when a person delivers over a bill to another without endorsing it, he does not subject himself to the obligations of the law merchant, and cannot be sued on the bill. As he does not subject himself to the obligation, he is not entitled to the advantages. If he can prove he has sustained damages, then he is discharged only to the extent of such actual damages: *Id.* The guarantor of a note does not stand in the same situation as parties to it. His obligation is in the nature of an insurance of the debt, and there is no need of the same proof to charge him as if he was an endorser. The necessity of demand in order to charge the endorser of a bill is solely grounded on the custom of merchants, and applies only to actions against the endorser on the bill itself. It does not apply when the guarantor is not an endorser: *Gibbs v. Cannon*, 9 S. & R. 201; *Overton v. Tacey*, 14 Id. 311; *McLughan v. Bovard*, 4 Watts 308. The law is clearly stated in 2 Parsons on Bills 184, where it is said if paper be transferred by delivery only as security for a pre-existing debt, and it is dishonored while in the hands of the transferee, it affects in no way the debt it was intended to secure. The original liability remains what it was, and upon dishonor of the paper, it is not even necessary to give him notice thereof as an endorser, but the debtor may show in defence any injury he has sustained by the actual laches of the creditor. Nor does the fact that the collaterals were exchanged for other securities, which were ultimately found worthless, change the liability unless it is further shown that a loss resulted to the owners of the collaterals by reason of such exchange: *Girard Fire and Marine Ins. Co. v. Marr*, 10 Wright 504.

The name of the plaintiff in error was neither in nor on the note. It was not payable to bearer. He was in no sense a party to it. With a view that the proceeds when paid should discharge an amount of his indebtedness equal thereto, he caused it to be made payable to his creditor and put into his hands. Through no fault of that creditor it was not paid. It is not shown that it could, at any time, have been collected of the makers. The acceptance from the makers of their two drafts was no payment, but did result in the payment of one-half the amount. Having sustained no loss or damage by any act of his creditor, the plaintiff in error has no just cause of complaint at being still held liable for his indebted-

ness. The creditor was not obliged to give up the unpaid draft before bringing this suit. It is not shown to be of any value, but if valuable he has a right to retain all the securities in his hands until he obtains satisfaction of the debt due him.

Judgment affirmed.

The general rule is now well settled in accordance with the doctrine announced in the particular case, that the taking of a note of the debtor or of a third person, is not payment unless it is so agreed. This principle has been affirmed in most of our courts, and has been sustained as follows: U. S. Sup. Court: *The Kimball*, 3 Wall. 37; *Peter v. Beverly*, 10 Pet. 532. Alabama: *Myatts v. Bell*, 41 Ala. 222; *Lee's Adm'r v. Fontaine*, 10 Id. 755; *Fickling v. Brewer*, 38 Id. 685; *McCrary v. Carrington*, 35 Id. 698. Arkansas: *Brugman v. McGuire*, 32 Ark. 733. California: *Ponce v. McEley*, 47 Cal. 154. Colorado: *Collins v. Dawley*, 4 Col. 138. Connecticut: *Dougal v. Cowles*, 5 Day 516; *Davidson v. Bridgeport*, 8 Conn. 477; *Bill v. Porter*, 9 Id. 31. Florida: *May v. Gamble*, 14 Fla. 467. Illinois: *Archibald v. Argall*, 53 Ill. 309; *White v. Jones*, 38 Id. 159; *Rayburn v. Day*, 27 Id. 46. Indiana: *Maxwell v. Day*, 45 Ind. 509; *Ritenour v. Mathews*, 42 Id. 7; *Jeffries v. Lamb*, 73 Id. 202. Iowa: *Farwell v. Grier*, 38 Iowa 83; *Huse v. McDaniels*, 33 Id. 406; *Kephart v. Butcher*, 17 Id. 240. Kansas: *Medberry v. Soper*, 17 Kans. 369; *Shepard v. Allen*, 16 Id. 182; *McCoy v. Haslitt*, 14 Id. 430. Louisiana: *Walton v. Bemiss*, 16 La. 140, 143. Maryland: *Haines v. Pearce*, 41 Md. 221; *Hoopes v. Strasburger*, 37 Id. 390. Michigan: *Gardner v. Gorham*, 1 Doug. 507; *Hotchin v. Secor*, 8 Mich. 494. Minnesota: *Daly v. Proetz*, 20 Minn. 411; *Goenen v. Schroeder*, 18 Id. 66; *McArdle v. McArdle*, 12 Id. 98; *Keough v. McNitt*, 6 Id. 513. Mississippi: *Wadlington v. Covert*, 51 Miss. 631; *Guion v. Doherty*, 43 Id. 553, 554. Missouri: *Leabo v.*

Goode, 67 Mo. 126; *Howard v. Jones*, 33 Id. 583; *Appleton v. Kennon*, 19 Id. 637. Nebraska: *Young v. Hibbs*, 5 Neb. 433. New Hampshire: *Ladd v. Wiggin*, 35 N. H. 421, 426; *Randlet v. Herren*, 20 Id. 102; *Clark v. Draper*, 19 Id. 423; *Smith v. Smith*, 27 Id. 244. New Jersey: *Wildrick v. Swain*, 34 N. J. Eq. 167; *Hutchinson v. Swarts-weller*, 31 Id. 205; *Freeholders v. Thomas*, 20 Id. 41. Ohio: *Sutliff v. Atwood*, 15 Ohio St. 186, 198; *McNaughten v. Partridge*, 11 Ohio 223, 232. Pennsylvania: *Leas v. James*, 10 S. & R. 307; *McGinn v. Holmes*, 2 Watts 121; *Brown v. Scott*, 51 Penn. St. 357; *League v. Waring*, 85 Id. 244. Rhode Island: *Wheeler v. Schroeder*, 4 R. I. 388. South Carolina: *Thomas v. Kelly*, 3 S. C. (N. S.) 214; *Mars v. Conner*, 9 Id. 76; *Gardner v. Hust*, 2 Rich. 601. Tennessee: *Andrews v. German National Bank*, 53 Tenn. 211, 222; *Union Bank v. Smiser*, 33 Id. 501, 514. Virginia: *Blair v. Wilson*, 28 Gratt. 165. West Virginia: *Stephenson v. Rice*, 12 W. Va. 575; *Dunlap v. Shanklin*, 10 Id. 662. Wisconsin: *Aultman v. Jett*, 42 Wis. 488; *Matteson v. Ellsworth*, 33 Id. 488; *Prine v. Voorhees*, 26 Id. 522. These cases recognise the authority of *Clark v. Mundal*, 1 Salk. 124, in which Lord Chief Justice Holt declared that "a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so."

In a recent case in Indiana, the distinction is taken between a promissory note negotiable by the law merchant, and one not negotiable. And it is held that if the note was negotiable, its execution and delivery must be regarded as

a payment of the prior debt, unless there was an agreement to the contrary. If it was not negotiable, it is not to be regarded as payment unless so agreed : *Krutinger v. Brown*, 12 Reporter 395. In New York, while the rule is that the note of a third person is not to be considered as payment unless so agreed between the parties (*Board of Education v. Fonda*, 77 N. Y. 350, 362), yet if the creditor receives the debtor's own paper, it cannot be regarded as payment of the pre-existing debt, although it was expressly agreed that it should be so considered. The reason given for this distinction being that, in the latter case, there is no consideration to support such a promise : *Frisbie v. Larned*, 21 Wend. 452 ; *Cole v. Sackett*, 1 Hill 516 ; *Waydell v. Luer*, 5 Id. 449 ; s. c. 3 Denio 410 ; *Rice v. Devey*, 54 Barb. 455.

On the other hand, in Maine, Massachusetts and in Vermont, the courts repudiating the rule, elsewhere so generally recognised, have always held to the theory that a note of the debtor or of a third person, is to be considered as having been taken in payment of a pre-existing indebtedness, unless otherwise agreed upon. In the absence of agreement to the contrary, it is *prima facie* payment of the indebtedness.

Maine : *Strang v. Hirst*, 61 Me. 9 ; *Paine v. Dwinel*, 53 Id. 53 ; *Gooding v. Morgan*, 37 Id. 419 ; *Descadillas v. Harris*, 8 Id. 298 ; *Varnier v. Nobleborough*, 2 Id. 121. Massachusetts : *Thacher v. Dinsmore*, 5 Mass. 299 ; *Maneely v. McGee*, 6 Id. 143 ; *Geodenow v. Tyler*, 7 Id. 36, 45 ; *Johnson v. Johnson*, 11 Id. 359, 362 ; *Fowler v. Bush*, 21 Pick. 230 ; *Ely v. James*, 123 Mass. 36. Vermont : *Hutchins v. Olcott*, 4 Vt. 549 ; *Torrey v. Barter*, 13 Id. 452 ; *Farr v. Stevens*, 26 Id. 299 ; *Collamer v. Langdon*, 29 Id. 32 ; *Wait v. Brewster*, 31 Id. 516.

But the presumption of payment is not applicable in the case of non-negotiable notes : *Dutton v. Kendrick*, 12 Me.

381 ; *Edmond v. Caldwell*, 15 Id. 340 ; *Bartlett v. Mayo*, 33 Id. 518 ; *Greenwood v. Curtis*, 4 Mass. 93 ; *Howland v. Coffin*, 9 Pick. 54.

It is to be noted, too, that it is held that if a negotiable note is given in a foreign state, it will not be considered as having been received in payment of the original indebtedness, unless such was its effect in the state or country where it was given : *Descadillas v. Harris*, 8 Me. 298. And if the negotiable paper received is not binding on all the parties previously liable, it is said that the presumption of payment may be considered as repelled : *Fowler v. Ludwig*, 34 Id. 455. So, where an unaccepted bill of exchange is received, it is not considered as having been received in payment : *Strang v. Hirst*, 61 Id. 9. And in a late case in Vermont, it is held that although the reception of negotiable paper is *prima facie* payment, it is not payment in the sense of extinguishing the creditor's claim upon collateral securities given for the original debt, unless it was so agreed : *Pinney v. Kimpton*, 46 Vt. 80.

It is worthy of remark, that in *Aultman v. Jett*, 42 Wis. 488, Mr. Chief Justice RYAN, a very able jurist, considered it the better rule to hold that the taking of a negotiable note should be considered as *prima facie* payment, although acquiescing in the contrary theory upon the principle of *stare decisis*. And it must be conceded that the reason given by Chief Justice SHAW in Massachusetts, for the rule there maintained is not without force. That reason was that it was equally convenient to the creditor to sue on the note as on the original consideration, so that there was no reason for considering the original simple contract as still in force. That, therefore, a presumption arose that it was intended the note should be deemed a satisfaction of the original debt. See his opinion in *Curtis v. Hubbard*, 9 Met. 323. The recent decision of the Supreme Court

of Indiana in *Krutsinger v. Brown*, *supra*, seems to bring the courts of that state into line with those of Maine, Massachusetts and Vermont on this subject.

It is agreed upon all hands that fraudulent or forged negotiable paper will not be allowed to have the effect of payment, although it was originally received as payment. The fraud practised vitiates the agreement of the parties to treat it as payment, or the presumption of the law that it was intended to be received as payment. This is the rule in England and America: *Stedman v. Gooch*, 1 Esp. 3; *Scholefield v. Templer*, 4 De Gex & J. 429; *Ritter v. Singmaster*, 73 Penn. St. 400; *Emerine v. O'Brien*, 36 Ohio St. 491, 496; *Hutchins v. Olcott*, 4 Vt. 549; *Wemet v. Missisquoi Lime Co.*, 46 Id. 458; *Wait v. Brewster*, 31 Id. 516.

It is also agreed, even in those states where the delivery of a promissory note is not payment unless so agreed, that where a bond is given for a contract debt, the debt is thereby extinguished, the former being a higher security than the latter: *McNaughten v. Partridge*, 11 Ohio, 223, 232; *Bank of Missouri v. Tesson*, 1 Mo. 617; *Vaughn v. Lynn*, 9 Id. 770; *Settle v. Davidson*, 7 Id. 604; *Hall v. Hopkins*, 14 Id. 450.

If, instead of being taken as payment the negotiable paper is transferred as conditional payment, or as collateral security for an existing debt, a subsequent recovery on such debt will depend on the fact whether or not any laches has been committed with regard to the transferred security. And it has been held that, where a draft drawn by a third person is endorsed by the debtor, and by him sent to the creditor, to be applied when paid, the creditor cannot sue on the original debt if he neglects to take the necessary steps to hold the debtor liable as endorser: *Jennison v. Parker*, 7 Mich. 355. See too, *Dayton v. Trull*, 23 Wend. 345; *Tobey v. Bar-*

ber, 5 Johns. 68; *Smith v. Wilson*, Andrews 187, 228; *Chamberlyn v. Delaware*, 2 Wils. 353; *Ward v. Evans*, 2 Ld. Raym. 928. Where one receives a draft as conditional payment, the duty devolves on the creditor of doing everything which is necessary to fix the liability of the parties: *Phenix Ins. Co. v. Allen*, 11 Mich. 501; *Briggs v. Persons*, 39 Id. 400. And the rule is, that if the creditor receives a note or bill as collateral, and loss occurs through his laches, he must make it good: *Lee v. Baldwin*, 10 Ga. 208; *Trotter v. Crockett*, 2 Porter 401; *Powell v. Henry*, 27 Ala. 612; *Russell v. Hester*, 10 Id. 535; *Darnall v. Morehouse*, 45 N. Y. 65; *Whitin v. Paul* (Supreme Court of Rhode Island), 11 Reporter 316; *Wakeman v. Gowdy*, 10 Bosw. (N. Y.) 208; *Hoard v. Garner*, 10 N. Y. 261; *Slevin v. Morrow*, 4 Ind. 425; *Lomberton v. Windom*, 12 Minn. 232; *Lyon v. Huntingdon Bank*, 12 S. & R. 61; *Williams v. Price*, 1 Sim. & Stu. 581; *Ex parte Mure*, 2 Cox 63. See *Kiser v. Ruddick*, 8 Blackf. 384; *Lawrence v. McCalmont*, 2 How. 426. It is his duty to make demand of payment and to give notice of dishonor: *Wadlington v. Covert*, 51 Miss. 631, 636. But it is not necessary that he should sue on it: *Kemmil v. Wilson*, 4 Wash. C.-C. 308; *Archibald v. Argall*, 53 Ill. 309; *Ripley v. Greenleaf*, 2 Vt. 129; *Bank of Penna. v. Potius*, 10 Watts 148; *Wadlington v. Covert*, *supra*. In a recent case in the United States Circuit Court (W. D. of Tennessee), where an insurance company had taken a draft in payment of the premium, and the policy contained a condition that it should be void if the draft was not paid when due, "without notice to any party or parties interested therein," it was held that the company was nevertheless bound to comply with the rules of commercial law as to negotiable paper, as to presentation and payment: *Pendleton v. Knickerbocker Life Ins. Co.*, 7 Fed. Rep. 169. But it is

said that proof of due diligence is not necessary if fraud was practised on the creditor by false representations as to the solvency of the maker, &c.: *Lake v. Gilchrist*, 7 Ala. 955; *Harton v. Scales*, Minor 166; *Nance v. Pope*, 1 Stewart 220; *Eagle Bank v. Smith*, 5 Conn. 74.

It seems to be agreed that, if a note of a third person is taken in absolute payment of a pre-existing debt, it is taken free from equities: *Mayberry v. Morris*, 62 Ala. 113; *Barney v. Earle*, 13 Id. 106; *Bank of Mobile v. Hall*, 6 Id. 639; *Bertrand v. Barkman*, 13 Ark. 150; *Bank of Republic v. Carington*, 5 R. I. 515; *Cobb v. Doyle*, 7 Id. 550; *May v. Quimby*, 3 Bush (Ky.) 96; *Cecil Bank v. Heald*, 25 Md. 563; *Williams v. Little*, 11 N. H. 66; *Kingsland v. Pryor*, 33 Ohio St. 19; *Reddick v. Jones*, 6 Ired. (N. C.) 109; *Outhwaite v. Porter*, 13 Mich. 533; *Walker v. Geissee*, 4 Whart. 252, 258; *Bardsley v. Delp*, 88 Penn. St. 420; *Knox v. Clifford*, 38 Wis. 651; *Atkinson v. Brooks*, 26 Vt. 574; *Russell v. Splater*, 47 Id. 273; *Emanuel v. White*, 34 Miss. 56; *Stevenson v. Heyland*, 11 Minn. 198; *Conklin v. Vail*, 31 Ill. 166; *Ives v. Farmers' Bank*, 2 Allen 236; *Blanchard v. Stevens*, 3 Cush. 162; *Brush v. Scribner*, 11 Conn. 388, 403; *Bond v. Central Bank*, 2 Kelly (Ga.) 92; *Swift v. Tyson*, 16 Peters 1; *Brown v. Leavitt*, 31 N. Y. 113; *Alaire v. Hartshorne*, 21 N. J. L. 665. But a difference of opinion exists where the note is taken as security for a pre-existing debt. It has been held in some cases that the holder takes free from equities when he receives the paper under such circumstances: *Goodman v. Simonds*, 20 How. 343; *Oates v. National Bank*, 100 U. S. 239; *Gibson v. Conner*, 3 Kelly 47; *Meadow v. Bird*, 22 Ga. 246; *Exchange Bank v. Butner*, 60 Id. 654; *Best v. Crall*, 23 Kans. 484; *Succession of Dolhonde*, 21 La. Ann. 3; *Louisiana State Bank v.*

Gaiennie, 21 Id. 555; *Giovanovich v. Citizens' Bank*, 26 Id. 15; *Sackett v. Johnson*, 54 Cal. 107; *Davis v. Russell*, 52 Id. 611; *Frey v. Clifford*, 44 Id. 342; *Cobb v. Doyle*, 7 R. I. 550; *Alaire v. Hartshorne*, *supra*. On the other hand there are many cases maintaining a contrary theory, among which may be cited the following: *Royer v. Keystone Bank*, 83 Penn. St. 248; *Lenheim v. Wilmarling*, 55 Id. 73; *Kirkpatrick v. Muirhead*, 16 Id. 117, 123; *Petrie v. Clark*, 11 S. & R. 377; *Body v. Jewsen*, 33 Wis. 402; *Bowman v. Van Kuren*, 29 Id. 209; *Jenkins v. Schaub*, 14 Id. 1; *Prentice v. Zane*, 2 Gratt. 262; *Bramhall v. Beckett*, 31 Me. 205; *Brooks v. Whitson*, 7 S. & M. 513; *Roxborough v. Messick*, 6 Ohio St. 448; *Alexander v. Springfield Bank*, 2 Met. (Ky.) 534; *Boyd v. Beck*, 29 Ala. 703, 713; *Fenouille v. Hamilton*, 35 Id. 319; *Andrews v. McCoy*, 8 Id. 926; *Bertrand v. Barkman*, 13 Ark. 150; *Rice v. Raitt*, 17 N. H. 116; *Bank v. Kent*, 15 Id. 579; *Stalker v. McDonald*, 6 Hill (N. Y.) 93; *Caddington v. Bay*, 20 Johns. 644; *Jones v. Swan*, 6 Wend. 589; *Hart v. Palmer*, 12 Id. 523; *Ruddick v. Lloyd*, 15 Iowa 441; *Ryan v. Chew*, 13 Id. 589. It is conceded, however, that if, instead of being simply received as a security, the creditor has been induced thereby to promise an extension of time, or to relinquish some advantage, or, if a new consideration appears, then the paper is held free from equities. See *Washington Bank v. Krum*, 15 Iowa 53; *Stotts v. Byers*, 17 Id. 303; *Brush v. Scribner*, 11 Conn. 388, 403; *Roxborough v. Messick*, 6 Ohio St. 448; *Alexander v. Springfield Bank*, 2 Met. (Ky.) 534; *Griswold v. Davis*, 31 Vt. 390; *Petrie v. Clark*, 11 S. & R. 377, 388; *Rosenberger v. Bitting*, 15 Penn. St. 278; *Bertrand v. Barkman*, 13 Ark. 150; *Bowman v. Millison*, 58 Ill. 36; *Paulette v. Brown*, 40 Mo. 54; *Park Bank v. Watson*, 42 N. Y. 490. So where the collateral has

been received at the time the original debt was contracted, it is held free from equities: *Bowman v. Van Kuren*, 29 Wis. 219; *Munn v. McDonald*, 10 Watts 270; *Griswold v. Davis*, 31 Vt. 390; *Logan v. Smith*, 62 Mo. 458. But where there are existing equities, the holder of the collateral can only recover upon it to the extent of his origi-

nal debt, although if no equities existed he would be permitted to recover the full amount of the collateral, holding the excess in trust for his original debtor: *Allaire v. Hartshorne*, 21 N. J. L. 665; *Atlas Bank v. Doyle*, 9 R. I. 76; *Bank v. Hemingray*, 34 Ohio St. 381; *Chicopee Bank v. Chapin*, 8 Met. 40.

HENRY WADE ROGERS.

Circuit Court, Southern District of New York.

ROSE v. STEPHENS AND CONDIT TRANSPORTATION COMPANY.

In a suit by one injured by the explosion of a boiler, against the owner of the boiler, whose servants were operating it, the mere fact of the explosion raises a presumption of negligence on the part of the owner, even though he occupied no contract relation to the party injured.

In such case the burden is upon the owner of the boiler to disprove negligence.

MOTION for a new trial.

This was an action by John C. Rose against The Stephens and Condit Transportation Company to recover damages for personal injuries caused by the explosion of a boiler. On the trial the following facts appeared. The defendant was the owner of the steamboat "Magenta," and in March 1878 leased her to D. D. Smith and others for one month, at a specified rental, the lessors to appoint and pay the engineer, fireman and pilot, and the lessees to appoint and pay the other officers and crew. The lessees used the boat for transporting passengers between Haverstraw and New York, and on one of the trips between these places, on March 23d 1878, the boiler exploded, injuring the plaintiff who was a passenger. It appeared that the explosion was caused by the corrosion of the iron composing a sheet of the steam chimney. It also appeared that the boiler had been built in 1873, that the shell of the steam chimney had been thoroughly examined in May 1877, when it was found in excellent condition; that in June 1877 the boat had been regularly inspected and licensed for a year; that in March 1878, before the boat was allowed to go out the engineer went inside the boiler, and inside of the steam chimney as far as he could and found no signs of decay, and that he did the same thing the Sunday before the explosion, but that no other examina-

tion was made of the boiler or steam chimney in 1878. The court charged the jury, *inter alia*, as follows: "The plaintiff, upon this issue of negligence, has relied to a considerable extent upon the presumption arising from the fact of the explosion, and I have intimated upon the trial and now instruct you that from the mere fact of an explosion it is competent for you to infer as a proposition of fact that there was negligence in the management of the boiler, or in some defect in its condition, for otherwise a casualty would not have occurred. * * * The law permits the jury to imply from the mere fact of an explosion a presumption of negligence." The court further charged that this presumption must be "met and repelled by the defendant by showing that it occurred from causes for which the defendant was not responsible; that it arose from some of those inscrutable causes from which accidents so frequently arise; that it took place notwithstanding the exercise of all due care and prudence on the defendant's part."

The verdict was for plaintiff. Defendant moved for a new trial.

Chauncey Shaffer, for plaintiff.

Butler, Stillman & Hubbard, for defendant.

The opinion of the court was delivered by

WALLACE, D. J.—The plaintiff was injured by the explosion of a steam-boiler which was being used by the defendant to propel a vessel chartered by the defendant to others to be used for the transportation of passengers and freight. If the explosion resulted either from the carelessness of the employees of the defendant in charge of the boiler, or from the negligence of the defendant in sending forth an unsafe and dangerous boiler to be used where human life would be endangered if the boiler should explode, it is conceded the defendant was liable. It is contended, however, that it was error to instruct the jury that they might infer such negligence from the fact of the explosion; and it is argued that such a presumption only obtains when the defendant is under a contract obligation to the plaintiff, as in the case of a common carrier or bailee. Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or in reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations

between the parties. It is indulged as a legitimate inference whenever the occurrence is such as, in the ordinary course of things, does not take place when proper care is exercised, and is one for which the defendant is responsible. It will be sufficient to cite two cases in illustration of the rule, without referring to other authorities.

In *Scott v. London and St. Catherine Dock Co.*, 3 Hurlst. & C. 596, the plaintiff, as he was passing by a warehouse of the defendant, was injured by bags of sugar falling from a crane by which they were lowered to the ground. The court said there must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. This case is cited, with approbation, in *Transportation Co. v. Downer*, 11 Wall. 129.

In *Mullen v. St. John*, 57 N. Y. 567, the plaintiff, who was upon a street sidewalk, was injured by the fall of an unoccupied building owned by defendant; and it was held that, from the happening of such an accident, in the absence of explanatory circumstances, negligence should be presumed and the burden cast upon the owner to disprove it.

In the present case the boiler which exploded was in the control of the employees of the defendant. As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable, and the instructions to the jury were correct.

The other questions which are presented upon the motion are not sufficiently serious to deserve extended comment. The instructions to the jury must be considered in their integrity, and not in isolated parts, and so considered present the law of the case fairly and correctly. The evidence amply justified the jury in the conclusion that the defendant had not made such an examination of the boiler as prudence required, preparatory to its employment for the season of 1878, and which, if made, would have revealed the defect.

The verdict undoubtedly awarded the plaintiff liberal damages for the injuries he sustained, but it is very difficult to measure the

compensation which a party should receive for such acute suffering as the plaintiff experienced. Certainly the verdict is not so obviously extravagant as to indicate prejudice or partiality. The motion for a new trial is denied.

The damages caused by explosions owe their origin mainly to three sources:

1. Steam boilers. 2. Blasting rocks.
3. Explosives and other dangerous substances.

In the case of bursting of steam boilers, the accepted ground of liability is actual negligence in the management of the boiler. The Supreme Court of Pennsylvania first developed this idea. The facts of the case in which the doctrine was thus asserted were these: A man drove a horse to defendant's steam grist mill to get some grist which he had left to be ground, and he was thus lawfully upon defendant's premises, and was just as much entitled to protection there as if he had been upon his own premises. (See for mention of this point *Loosee v. Buchanan*, 51 N. Y. 476.) While there, the steam-boiler exploded and killed his horse, and the action was brought for the value of the horse; and it was held that, to entitle the plaintiff to recover, he was bound to show the want of ordinary skill and prudence: *Spencer v. Campbell*, 9 W. & S. 32. This position is approved by Mr. Thompson in his admirable work on Negligence (vol. 1, p. 112), in which he says of the view taken of the management of the boiler: "Whether they had been negligent in using it, was made to turn on the question whether they had notice of its insufficiency, or, what was the same thing, whether the circumstances were such that they were bound to know it; and it was ruled, with obvious propriety under the circumstances, that they could not shelter themselves from responsibility under the plea that they were unacquainted with such machinery; that they applied to a competent and good machinist for the machine, paid him a

sound price for it, and that he represented it as sufficient. If they chose to make his opinion the rule of their conduct, in opposition to the evidence of their own senses, they had no right to visit the consequences of their folly upon their customers."

The pith of this early Pennsylvania case was endorsed and extended in New York in the noted case of *Loosee v. Buchanan*, decided in 1873, by the Commission of Appeals, 51 N. Y. 476; affirming s. c. 42 How. Pr. 385; reversing s. c. 61 Barb. 86. There EARL, C., delivering the opinion of the court said, in comparing the two cases: "I am unable to see how that case differs in principle from the one at bar. To sustain the broad claim of the plaintiff, it should have been held in that case that the owner of the steam-boiler was absolutely liable, irrespective of any care, skill or diligence on his part, for any damage which the boiler, by its explosion, occasioned to any property lawfully in the vicinity. Within the rules laid down by these authorities (referring to the cases previously reviewed), the defendants in this case could not, without proof of negligence, be made liable for injuries caused to the persons of those who were near at the time of the explosion; and it would be quite illogical to hold them liable for injuries to property, while they were not liable for injuries to persons by the same accident.

The action in which this view was expressed, was brought to recover damages occasioned by the explosion of a steam-boiler at the mill of the Saratoga Paper Company. The fragments were projected and thrown on to the plaintiff's premises and through several of his buildings, thereby injuring and damag-

ing the same and destroying personal property therein. Besides the company, other parties were made defendants, some on the ground that they were trustees, stockholders and agents of the corporation, and superintending its business as such, and hence jointly liable with it; others on the ground that they were the manufacturers of the boiler, and made it in such a negligent manner that the boiler exploded.

Upon the first trial, the presiding judge dismissed the action as against the defendants who manufactured the boiler, and held that the other defendants were liable irrespective of negligence, excluding all to show that they were not guilty of negligence. For this error, upon appeal to the general term, the judgment was reversed and new trial granted, the court holding that the defendants could be made liable only by proof against them of negligence. Upon the second trial, the presiding judge held in accordance with the law as thus laid down by the General Term, and upon the question of negligence, the jury decided against the Saratoga Paper Company, and in favor of the other defendants. The plaintiff claimed, as he did upon the first trial, that the defendants were liable without the proof of any negligence, and requested the justice so to rule; and the refusal of the justice so to rule raised the principal question considered on the final appeal. The claim on the part of the plaintiff was, that the casting of the boiler upon the premises by the explosion was a direct trespass upon his right to the undisturbed possession and occupation of his premises, and that the defendants were liable, just as they would have been for any other wrongful entry and trespass upon his premises.

The opinion in the case combated this position and exhaustively reviewed the pertinent authorities. It was shown that the cases where there was liability for the act of interference itself, irrespective of negligence, were few in number and sub-

ject to important exceptions. Thus the removal of the support of adjoining soil was an infringement of the natural right of lateral support (*Farrand v. Marshall*, 21 Barb. 409); but this rule must undoubtedly be somewhat modified in its application to cities and villages (*Radcliff's Executors v. Mayor, &c., of Brooklyn*, 4 Comst. 203). Blasting of rocks and thereby injuring the adjacent freehold, is a ground for liability, though no negligence or want of skill was shown, for the damage was the necessary and immediate consequence of the act done (*Hay v. The Cohoes Company*, 2 Comst. 159). This, however, was far from an authority for holding that the defendants, who placed a steam-boiler upon their lands and operated the same with care and skill, should be liable for the damages caused by the explosion without their fault or any direct or immediate act of theirs. The subject of interference with the natural flow of water, to the prejudice of another riparian owner, was discussed (as considered in the cases of *Bellinger v. The New York Central Railroad Co.*, 23 N. Y. 47; *Pixley v. Clark*, 35 Id. 520, and *Selden v. The Delaware and Hudson Canal Co.*, 24 Barb. 362), and the conclusion reached that liability was incurred, as by a nuisance, irrespective of negligence, unless the injurious work was done pursuant to legislative authority. So it had been held that a party had no right to operate a steam-engine and other machinery upon his premises so as to cause the vibration and shaking of plaintiff's adjoining buildings to such an extent as to endanger and injure them. *McKeon v. See*, 4 Robt. 459, affirmed, 51 N. Y. 300. But this case was decided upon the law of nuisance. The decision in this case and in scores of similar ones to be found in the books, was far from an authority that one should be held liable for the accidental explosion of a steam-boiler, which was in no sense a nuisance.

After distinguishing the law as to wild

animals and trespass upon land, the decision continues; "So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance, and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation by the general good in which he shares, and the right which he has to place the same things upon his lands."

The opinion admitted that a contrary view has been entertained in England, where the construction of a reservoir which flooded adjacent mines, was regarded as creating liability for the damage so caused, though the defendants were not personally guilty of any negligence; upon the broad ground that one who, for his own purposes, brings upon his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. This was ruled in *Fletcher v. Rylands*, Law Rep., 1 Exch. 265, affirmed Law Rep., 3 H. L. 330; and followed in *Smith v. Fletcher*, Law Rep., 7 Exch. 305. But it was in direct conflict with the law as settled in this country in regard to mill-dams and reservoirs (Ang. on Water-courses, sect. 336; *Lapham v. Curtis*, 5 Vt. 371; *Todd v. Cochell*, 17 Cal. 97; *Everett v. Hydraulic, &c., Co.*, 23 Id. 225; *Shrewsbury v. Smith*, 12 Cush. 177; *Livingston v. Adams*, 8 Cow. 175; *Bailey v. The Mayor, &c., of New York*, 3 Hill 531; s. c. 2 Denio 433; *Pixley*

v. Clark, 35 N. Y. 520, 524; *Sheldon v. Sherman*, 42 Id. 484). Opposed to its position was also a class of cases in reference to damage from fire communicated from adjoining premises (*Clark v. Foot*, 8 Johns. 422; *Tourtellot v. Rosebrook*, 11 Metc. 460; *Hinds v. Barton*, 25 N. Y. 544; *Teall v. Barton*, 40 Barb. 139; *Cook v. The Champlain Transportation Co.*, 1 Denio 91), from which it appeared that negligence must be shown. The same rule that a party exercising adequate skill and care is free from liability applied to injuries to the person not designedly inflicted, but due to inevitable accident (*Dygert v. Bradley*, 8 Wend. 469; *Brown v. Kendall*, 6 Cush. 292; *Bizzell v. Booker*, 16 Ark. 309). The conclusion was, therefore, reached that the rule is, at least in this country, a universal one, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part; and hence that the defendants were not liable for the damages caused by the bursting of the steam-boiler on their premises.

Concerning this case and a parallel one in New Jersey, it has been remarked: "The cases of *Loose v. Buchanan* (cited *supra*) and *Marshall v. Welwood*, 38 N. J. L. 339, where the same conclusion was reached upon similar facts, undoubtedly proceed upon the true ground. Steam has come into such general use as a motive power, not only in the operations of commerce and manufactures, but even in those of agriculture, that a rule of law making those who employ it insurers of the safety of others against damages arising from its use would not only be contrary to the analogies of the law, but would impose serious restraints upon the most necessary and beneficial industries. Both the proprietor of machinery propelled by steam and the engineer in charge of such machinery, have the strongest motives for watching over its safety. The pro-

perty of the one and the life of the other depend upon constant vigilance in this regard. These motives will, ordinarily, secure that degree of skill and attention which the safety of the public demands, without the aid of a rule making the proprietor liable, in any event, for damages resulting from an explosion :”
1 Thomp. Neg. 112.

Marshall v. Welwood, referred to in these comments, was decided by the Supreme Court of New Jersey in 1876. BEASLEY, C. J., there criticised the English doctrine as to the bursting of reservoirs, the principle of which, if accepted, would, he declared, rule the case before the court ; “ for water is no more likely to escape from a reservoir and do damage, than steam from a boiler ; and, therefore, if he who collects the former force upon his property, and seeks, with care and skill, to keep it there, is answerable for his want of success, so is he who, under similar circumstances, endeavors to deal with the latter. There is nothing unlawful in introducing water into a properly constructed reservoir on a person’s own land, nor in raising steam in a boiler of proper quality ; neither act, when performed, is a nuisance *per se* ; and the inquiry consequently is, whether in the doing of such lawful acts the party who does it is an insurer against all flaws in the apparatus employed, no matter how secret or unascertainable by the use of every reasonable test, such flaws may be.” After criticising the supposed analogy of the escape of cattle and showing the cases concerning vaults out of repair and the fumes of alkali works to be covered by the law of nuisances, it is finally said : “ If the steam-engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had in that situation exploded, and had inflicted injuries on travellers or bystanders, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskilfulness.

By changing the place of the accident to private property, I cannot agree that a different rule obtains.”

A different rule, however, at least to the extent of holding the explosion *prima facie* evidence of negligence, was adopted in the principal case and also in *Fay v. Davidson*, 13 Minn. 528. In both cases the fact that the boiler of a steamboat exploded was regarded as of itself evidence of negligence sufficient to render the owner of the boat liable for resulting injuries. Of course, there were stronger grounds for this view where a repealed federal statute provided that in such cases the fact of the bursting of the steamboat boiler should be taken as full *prima facie* evidence to charge the defendants or those in his employment with negligence : *McMahon v. Davidson*, 12 Minn. 357. But the general current of authority is as previously stated.

As to the parties liable for such explosions, we find note made of an early English case where a steam-boiler and engine had been newly set up in a building of a sugar refinery. The defendant and his servants (not the owners of the works) were experimenting with the apparatus with a view to perfect a process for refining sugar. While the boiler was then under the management of these parties it exploded, tearing down an adjacent building. The disaster was due to mismanagement on the part of the defendant’s servants and to a defect in the materials of which the boiler was composed. It was held that the owner of the adjacent building might recover damages, that the action was properly brought against the person in charge of the boiler at the time of the explosion, and that it was not necessary to bring it against the owner of the building in which the boiler was : *Witte v. Hague*, 2 Dow. & Ry. 33 ; 1 Th. Negligence 113. The New York Court of Appeals has held that the manufacturer and vendor of a steam-boiler is not liable to a person other than the vendee

for damages occasioned by its exploding in consequence of its having been defectively constructed: *Lowee v. Clute*, 31 N. Y. 494. This opinion has been criticised (1 Th. Neg. 233) as contrary to previous authority in the same court (*Thomas v. Winchester*, 6 N. Y. 397). The same commentator characterises it as unsound in principle. The grounds for this dissent are thus stated: "Steam-boilers are highly dangerous, even when properly constructed; but when defectively constructed, nothing is more probable than that they will explode, and that the explosion will kill or injure innocent persons and destroy adjacent property. The ignorant or unskilful construction of such a dangerous machine is a degree of negligence approaching the grade of crime; and damages ought, it should seem, to be given in such cases to any one who has sustained an injury which a due regard for the lives and property of others would have prevented." To the same effect are remarks in *Allen v. Talbot*, 6 Pac. C. L. J. 985, where it is said: "The Acts of Congress recognise a steam-boiler as highly dangerous. The Supreme Court of the United States also recognises it as highly dangerous. And it seems that a steam-boiler in its nature is imminently dangerous—as much so as a gun." The questions involved in this discussion pertain to dangerous articles generally, and will be considered later.

In the case of personal injuries caused by blasting of rocks, it has been laid down that blasting rocks in a public street, even in the prosecution of some public work, is a dangerous nuisance, for which an action lies by a person thereby injured: *Ware v. St. Paul Water Co.*, 1 Dill. 465. But there have been cases where recovery in such instances has been denied, though not for reasons which impair the force of the statement just made. Thus there was a failure to recover where an action was brought against the city of New York to

obtain damages for the death of plaintiff's child, caused by employees of the defendant blasting rocks in a street of the city. It seems that a charge from the blast threw a rock through a window of the plaintiff's house, killing the child. A judgment was rendered for the plaintiff, but merely on technical grounds; and a subsequent judgment (reported in 8 N. Y. 222,) was rendered in favor of the defendant, it being ruled that the city was not liable because the blasting was done by an independent contractor. Regarding the proof of negligence in such cases, the court of first resort in the same state has held, where suit was brought by a person injured by a blast, that it will be *prima facie* evidence of negligence to show that the person engaged in blasting rocks failed to take such precautions against accidents as were required by the city ordinances: *Devlin v. Gallagher*, 6 Daly 494. So the highest tribunal in that jurisdiction has passed upon the degree of care required to be exercised by a corporation blasting rocks on its own land. It was held evidence of negligence that no warning that a blast was about to be fired was given to persons passing by over the land of the corporation; and this was ruled although the blasting was done in a quarry forty feet below the surface of the ground with sand-blasts which are not usually dangerous: *Driscoll v. Newark, &c., Co.*, 37 N. Y. 637. (As to the admissibility of the evidence of practical miners as experts on the quality of blasting powder, see *Snowden v. Idaho Quartz Mining Co.*, 55 Cal. 443.) It will be seen that though a high degree of care is exacted from persons engaged in blasting rocks, yet where injuries to the person alone result, it is not pretended that there is any liability irrespective of negligence. This has been ruled, however, where the consequent injury was done to the adjacent freehold or possession of another. Thus in *Hay v. The Cohoes Co.*, 2 Comst.

159, the defendant, a corporation, dug a canal upon its own ground for the purposes authorized by its charter. In so doing, it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling, upon lands adjoining. It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. "This decision," says the court in the before-recited case of *Losee v. Buchanan*, 51 N. Y. 476, "was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land." Judge GARDINER, in delivering the opinion, lays down broadly the principle that "every individual is entitled to the undisturbed possession and lawful enjoyment of his own property," citing the maxim *sic utere tuo*, &c.; and this view has been, as we have seen, criticised for overlooking the exceptions to the rule. Pursuant to this decision, it has been further held by the same court that, evidence of absence of negligence in such cases is inadmissible, where there is no claim for exemplary damages: *Tremain v. The Cohoes Co.*, 2 N. Y. 163. The view that the exercise of ordinary care does not avoid liability in such cases, is also adopted in Maryland: *Scott v. Bay*, 3 Md. 431. On the other hand, some of the New England courts, take a diametrically opposite position, and hold that such an invasion of another's freehold by a railway company constructing its road, is not a *tort* at all. But this is held because there are statutes providing for compensation to landowners for all damages arising from the building of such roads: *Dodge v. County Commissioners*, 3 Metc. 380;

Sabin v. Vermont, &c., Railroad Co., 25 Vt. 363; *Whitehouse v. Androscoggin Railroad Co.*, 52 Me. 208. The last case holds that *tort* will lie in such cases for failure to remove loose stones scattered upon plaintiff's land. Regarding the proof required where injury is done to houses or lands by blasting rocks, and the parties to be sued, see *Hardrop v. Gallagher*, 2 E. D. Smith 523; *Gourdier v. Cormack*, 2 Id. 200; *Ulrich v. McCabe*, 1 Hilt. 251; *McCafferty v. Spuyten Duyvil, &c., Railroad Co.*, 61 N. Y. 178; *Brown v. Lent*, 20 Vt. 529.

Regarding damages caused directly by explosives, the leading decision is the celebrated nitro-glycerine case in the Supreme Court of the United States (*Parrot v. Wells, Fargo & Co.*, 15 Wall. 524), which involved the liability of a carrier of that destructive compound. A firm of express-carriers received and transported from New York to San Francisco a package of nitro-glycerine, a substance then little known, in ignorance of the name and character of its contents, and without negligence. The package having leaked on the voyage, it was examined when it was received at the carrier's warehouse in San Francisco. An agent and servant of the express company, together with a representative of the steamship company which had transported it for them, proceeded in the usual manner, and in ignorance of the character of the contents of the package, to open it for the purpose of ascertaining the cause of the leakage. While they were doing this, it exploded, killing all persons present, destroying the building in which it was, and greatly damaging other buildings. It was held that the carriers were not liable to pay damages for the property thus destroyed, except as to that occupied by them as tenants under a lease, as to which they admitted a liability as for waste. It had been contended that the defendants were chargeable with

notice of the character and properties of the merchandise in their possession, and of the proper mode of handling and dealing with it, and were consequently guilty of negligence in receiving, introducing and handling the box containing the nitro-glycerine. But Justice FIELD, who delivered the opinion of the court, said: "If express-carriers are thus chargeable with notice of the contents of packages carried by them, they must have the right to refuse to receive packages offered for carriage without knowledge of their contents. It would, in that case, be unreasonable to require them to accept, as conclusive in every instance, the information given by the owner. They must be at liberty, whenever in doubt, to require, for their satisfaction, an inspection even of the contents, as a condition of carrying the packages. This doctrine would be attended, in practice, with great inconvenience, and would seldom lead to any good. Fortunately the law is not so unreasonable. It does not exact any such knowledge on the part of the carrier, nor permit him, in cases free from suspicion, to require information as to the contents of the packages offered, as a condition of carrying them." To this effect are cited *Crouch v. London & North-Western Railway Co.*, 14 C. B. 291, and *Brass v. Maitland*, 6 El. & Bl. 485. The opinion then proceeds: "The defendants, being ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business, and handling it in the same manner as other packages of similar outward appearance were usually handled." An illustration of a confirmatory character was taken from the case of *Pierce v. Winsor*, 2 Cliff. 18, where the charterer of a ship was held not liable for the results of taking mastic, an article new in commerce, as freight, though it was so affected by the voyage that it injured other parts of the

cargo in contact with it. Finally, the case before the court was regarded as one of unavoidable accident, for the consequences of which the defendants were not responsible. The shipper of dangerous articles is, however, liable where they explode and cause injury, if he has not taken proper care to prevent their delivery without notice of their character. This is illustrated by the case where two substances, prepared by different manufacturers, which were generally used together, were dangerously explosive in combination. A customer sent separate orders to each manufacturer for quantities of the respective substances, to be forwarded to him by a certain common carrier. He further directed one of the manufacturers to make the substance which he was to furnish of greater explosive power than usual. The orders were filled, and the substances delivered in apparently harmless packages to the carrier, by the manufacturers. Each of the latter acted independently of the other, and was ignorant of the other's proceedings; and no notice was given to the carrier of the nature of either of the substances, or their character in combination. The carrier stowed them together in his vehicle, and while he was transporting them with due care, they exploded, and injured his property, and property of others in his custody. Property of a third person, near which the vehicle was standing, was also injured. The explosion was practically a single one, and it was impossible to distinguish how much of the damage was produced by either substance. It was ruled that the manufacturers, but not the customer, were jointly liable in tort to the carrier and the third person: *Boston, &c., Railroad Co. v. Shanly*, 107 Mass. 568.

Again, the manufacturers of a safety-fuse have been declared to be liable for personal injuries, including the loss of his eyesight, sustained by plaintiff while blasting for a tunnel. As foreman of a

gang of men, plaintiff, having set the blast (according to his statement) lighted the fuse with a lighted candle, and walked towards the mouth of the tunnel where the men were standing. Seventeen minutes later he walked to the blast, and neither seeing nor smelling any smoke, concluded the fuse had gone out, and reached forward to remove the fuse and replace it with another piece, and just then the explosion took place, causing the severe injuries complained of. It was ruled that the plaintiff could not recover, because he was guilty of contributory negligence, as shown partly by his own admissions, and partly from the testimony of experts. They agreed that it is impossible for a fuse to burn and hang fire for seventeen minutes. The hole dug in this case was like the bore of a gun, and the charge was put into it, not for the purpose of producing the final blast, but for the purpose of "chambering it," or enlarging the bottom of the hole so as to put in a large charge of black powder. The experts testified that the blast in such a hole will shoot out like a charge from a gun, and if the plaintiff had approached it in a careful and proper manner, had taken another charge and dropped it in, he could not have received the injury. They said he must have had his face over the hole, for he could not have been thus injured if he had kept his face away from the line or axis of the hole. For these reasons the plaintiff failed to recover; but the liability the manufacturers would otherwise have incurred was fully shown: *Allen v. Talbot*, 6 Pac. Coast L. J. 980. It was declared that if an article manufactured is, by its nature, imminently dangerous, and the injury is the natural and probable consequence of the manufacturer's neglect and failure to use due skill and care, the manufacturers are liable to any person injured by the same. It was further laid down that although blasting fuse is not of itself an explosive, yet it

is always used in connection with some dangerous explosive. Hence the law imposes upon the manufacturer a duty to the public to manufacture it with due skill and care, and if he neglects to do so he is liable to any one injured through his negligence. The form in which this conclusion was stated, was this: that a manufacturer of any article imminently dangerous to human life, to wit, fuse, nitro-glycerine, dynamite, gunpowder, giant powder, and other explosives, steam-boilers, guns and torpedoes, owes a duty to the public to exercise that care, skill, prudence and diligence in the manufacturing thereof, which a good business man, skilled in the manufacturing thereof—which an expert in that business—is accustomed to use, and is not liable as an insurer: *Allen v. Talbot*, *supra*.

The plaintiff in the case just cited was working under the direction of railway contractors, to whom the fuse had been sold by defendant's agent. The questions involved, therefore, also included the liability for selling dangerous articles. On this point it was claimed that the fuse was warranted by the manufacturers. But it was held that defendants were liable, for any breach of such warranty, only to persons directly interested in the contract of sale. This was ruled upon the principle that, the manufacturer of an article is ordinarily liable only to the vendee, for any defect therein, and then only by virtue of the contract. He is not liable to third parties, not privy to the sale, for injuries arising from defect in the article, except he owes them a duty, as in the case of an article imminently dangerous. This distinction was illustrated by the case of *Loop v. Litchfield*, 42 N. Y. 351. There the defendants made and sold a cast-iron balance-wheel, to be used with a circular saw. The wheel was defectively constructed. The wheel burst, a fragment struck plaintiffs' intestate, who was using the machine with the vendee's.

consent, and caused his death. It was held, in an action for causing death by negligence, that the plaintiffs could not recover, although they tried to bring their case within the principle above stated (a principle which was also applied to deadly drugs, in *Thomas v. Winchester*, 6 N. Y. 397), by asserting that the fly-wheel in question was a dangerous instrument. But the court said: "Poison is a dangerous instrument. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring-gun, a loaded rifle, or the like. They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose." But the object in controversy was regarded as not possessing such attributes.

On the other hand, the principle of the liability of the vendor of dangerous articles, where the resulting explosions injured the vendee, has been applied, to sales of naphtha (*Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64), and of gunpowder to a child (*Carter v. Towne*, 98 Mass. 567). But see a later judgment to the contrary in the same case, on the ground that the gunpowder had come into the custody of the child's parents before it was fired, and that the sale to the child was not the proximate cause of the injury: 103 Mass. 507. So, though on different grounds, the vendor has been held liable in damages where he warranted a gun to be good and safe, where a father had purchased it to be used by himself and his sons, and it exploded while one of the sons was using it, in consequence of its defective construction: *Langridge v. Levy*, 2 M. & W. 519, affirmed 4 Id. 337. The responsibility of the vendor was placed upon the ground of his direct warranty, and his knowledge of the purpose for which the gun was to be used, and it is this feature of the case which may be regarded as distinguishing it from the safety-fuse case.

The further limitations of the doctrine occur when the acts of a third party intervene to produce the explosion. Among the instances given is that, where the defendants who were druggists and chemists, ignorantly sold sulphide of antimony as black oxide of manganese, and the vendees resold it as the latter to the plaintiff, who, under the same belief, mixed it with chlorate of potassa. In this way a dangerous and explosive substance was created, which exploded, damaging the plaintiff. But the defendants were held not liable, because it was not shown that there was any duty or obligation resting on the defendants toward the plaintiff in the sale to his vendors: *Davidson v. Nichols*, 11 Allen 514.

As for explosions caused by escape of gas or its mismanagement, the liability of the companies which manufacture and sell this highly explosive agent is based upon negligence. The doctrines of contributory or intervening negligence, therefore, play an important part in determining upon whom the resulting injury is to be blamed. See *Lannen v. Albany Gas Co.*, 44 N. Y. 459; *Burrows v. March Gas & Coke Co.*, Law Rep., 5 Exch. 67, affirmed Law Rep., 7 Exch. 96; *Lanigan v. New York Gas-Light Co.*, 71 N. Y. 29; *Holly v. Boston Gas-Light Co.*, 8 Gray 123; *Flint v. Gloucester Gas-Light Co.*, 3 Allen 343; s. c. 9 Id. 552; *Bartlett v. Boston Gas-Light Co.*, 117 Mass. 533; s. c. 122 Id. 209; *Kimmell v. Burfeind*, 2 Daly 155. As to the duty of a gas company in case of an extensive conflagration in a city, see *Hutchinson v. Boston Gas-Light Co.*, 122 Mass. 219.

The latest decisions on the subject of gas explosions are both by the Supreme Court of Pennsylvania, and present features of more than ordinary interest. The first of these is the case of the *Oil City Gas Co. v. Robinson*, 13 Reporter 253, decided November 7th 1881. It was therein held that a gas company

which neglects to repair a defective pipe whence gas escapes into a sewer, causing an explosion therein, is liable for the damage caused by the explosion. But on the other hand it was ruled that the civil engineer of the city was guilty of contributory negligence and could not recover, as he smelt the illuminating gas in the sewer, and nevertheless entered with an exposed light, whereupon the explosion took place.

The other and later case, decided January 16th 1882, was that of *Strawbridge v. City of Philadelphia*, 13 Reporter 216. The city which was sued, manufactured and distributed its own illuminating gas. It was held not to be responsible irrespective of negligence, for injuries to adjacent property caused

by an explosion; as the business which the city carried on was not a nuisance in itself, or in the mode of its management. But it was furthermore again ruled, that the plaintiff, a storekeeper, was to be regarded as having contributed to the injury, and could not recover therefor. The ground for this position was, that he had illegally, and for his own purposes, made an excavation under the street in front of his own premises, thereby removing the earth which before stood between said premises and a gas main in said street, and that the gas had thus escaped, penetrated the premises, and exploded.

A. DONAT.

San Francisco.

Supreme Court of Tennessee.

MISSISSIPPI MILLS v. UNION AND PLANTERS' BANK OF MEMPHIS.

The vendor's right of stoppage *in transitu* is not defeated by the levy of an attachment upon the goods as the property of the vendee, at the instance of his creditor, while the goods remain in the hands of the carrier after the termination of the transit, but before a reasonable time has elapsed for delivery to the vendee.

A. received an order from B. to ship goods, but immediately received another message not to ship before a certain date. By mistake the second message was disregarded and the goods shipped immediately. They arrived at the railroad depot at which B. was to receive them but were not taken possession of by B., and while there were attached by B.'s creditors. A. learning that B. was insolvent ordered the goods to be stopped and replevied them: *Held*, that A. was entitled to the goods as against the attaching creditors.

(*Boyd v. Mosely*, 2 Swan 660, distinguished, and the contrary doctrine of that case held to be *obiter dictum*.)

REPLEVIN by a vendor claiming to exercise a right of stoppage *in transitu* against a creditor of the vendee who had attached the goods in the hands of the carrier.

The case was tried by the judge without a jury, the parties having agreed upon the facts which were in substance as follows:

Sometime prior to January 16th 1880, plaintiff sold to Williford & Anderson, merchants at Bartlett, Tennessee, on a credit of sixty days, four coils of rope and one bale of cottonades, of the

value of \$150. Plaintiffs then supposed Williford & Anderson to be solvent. Before the goods had been shipped plaintiffs received from Williford & Anderson a postal card, dated January 16th 1880, requesting that the goods should not be sent until February 1st. By inadvertence plaintiffs shipped the goods by rail on January 20th, and they arrived at the depot at Bartlett on January 29th. Meanwhile, on January 27th, Williford & Anderson being insolvent had made an assignment for the benefit of creditors. At that time they were indebted in the sum of \$237.75 to the defendant bank which, on January 29th 1880, issued an attachment which was on January 30th levied on the said goods. Subsequently judgment was rendered in favor of the bank in the attachment proceedings for \$237.75. At the time of the attachment the goods were still in the depot at Bartlett, not having been taken possession of by Williford & Anderson. On February 2d 1880, plaintiffs, having been notified by telegram from Williford & Anderson of the assignment, endeavored to stop the goods *in transitu* and being resisted in this by the attaching creditor replevied the goods on February 4th 1880. It further appeared that the railroad agent was not in the habit of notifying consignees of the arrival of goods.

Upon these facts the court gave judgment for defendant and plaintiff appealed.

B. J. Kimbrough, for plaintiff.

J. M. Greer, for defendant.

The opinion of the court was delivered by

DEADERICK, C. J.—The controlling question in the case is, “had plaintiff, upon the facts admitted, lost the right of stoppage *in transitu*.”

It is insisted for defendants that admitting there was no actual possession of the goods by Williford & Anderson, still the levy of the attachment terminated such right; and the case of *Boyd v. Mosely*, 2 Swan 661, is relied upon to sustain this position.

By an examination of the 2 Swan case, it will appear that it was not a case raising the question of the right of stoppage *in transitu*, and is therefore a mere *dictum*, as correctly said by Mr. King in his Digest, vol. 3, sect. 5188, sub. sect. 4.

This right of stoppage *in transitu* arises solely upon the insol-

veny of the buyer : Benj. on Sales, sect. 828, 837. It does not exist against a solvent purchaser.

In the 2 Swan case it was correctly held by this court, where goods were ordered and placed on the wagon of a common carrier, directed to the purchaser in accordance with his directions, that the delivery to the carrier was a delivery to the buyer, and the property vested in him, and might be legally attached for his, the buyer's, debts. The seller had replevied the goods, and his claim was urged upon the grounds, 1. That the delivery was not complete. 2. That he had a lien upon the goods until the price was paid.

Both these claims were decided adversely to him, and his honor, Judge TOTTEN, proceeded to say: "By this delivery (to the carrier) the property becomes vested in the buyer, subject only to the seller's right of stoppage *in transitu*, which is an equitable right not inconsistent with the former; it consists in reserving the possession of the goods while *in transitu*, and retaining them until the price be paid."

"But," he adds, "this right is gone if other *bona fide* rights intervene before it be exercised; as if the buyer sell the goods, or they be legally attached for debt, as in the present case."

There is not only no statement in the opinion in that case that the buyer was insolvent, but it is stated that plaintiff had "full confidence in the credit and solvency of the buyer." The case was therefore wanting in the element of insolvency of the buyer to bring it within the principles of law conferring upon the vendor the right of stoppage *in transitu*. But as before stated, the case was correctly decided upon the ground that the sale and delivery to the carrier was a delivery to the buyer: Ang. on Carriers 497; Benj. on Sales, sects. 3, 308, 675, 840.

But if the goods have not gone into the actual possession of the buyer, and he has not made a *bona fide* sale of them, and he be insolvent, the seller may reclaim them for his own indemnity: Benj. on Sales, sects. 675, 677, 840; 5 Wait's Actions and Defences 611. And this right of reclamation he may exercise, notwithstanding the goods have been seized in execution, or by attachment, by creditors of the buyer: Benj. on Sales, sects. 832, 836; 5 Wait's Actions and Defences 616; 50 Miss. 590.

We are of opinion, therefore, that the judgment of the circuit judge was erroneous, and it will be reversed. The same result

would probably follow upon the further ground that the goods were ordered not to be sent before February 1st, and were sent without the consent of Williford & Anderson at an earlier date, and they were not bound then to receive them.

The property in question having been delivered to plaintiff on his writ of replevin, he will take his judgment here for costs.

The text-writers have not discussed the question involved in the foregoing case. It does not seem to have been considered an open question. The general proposition has been frequently stated that the assignment of the bill of lading by the consignee or vendee of the goods is the only way of defeating the vendor's right of stoppage *in transitu*. Judge REDFIELD, in a note to his work on Carriers, says, "We are not aware that the right can be defeated in any other mode, until the goods come to the virtual possession of the vendee." (P. 189.) Mr. Benjamin, in his treatise on Sales, says this right "is defeasible in one way only." (Sect. 862.) Mr. Perkins, the American editor of Benjamin, inserts at this point a note referring to American cases, which hold the doctrine of the principal case.

It was held in England that the vendor's right of stoppage was not defeated by an attachment of the goods as the property of the vendee, at the instance of his creditor: *Smith v. Goss*, 1 Camp. 282 (1808.)

In America, the same doctrine has been held in the following cases, which are stated in their chronological order: *Naylor v. Dennie*, 8 Pick. 198; *Hause v. Judson*, 4 Dana (Ky.) 8; *Hays v. Mouille*, 14 Penn. St. 48; *Aguirre v. Purmelee*, 22 Conn. 473; *Cox v. Burns*, 1 Clarke (Iowa) 64; *Kitchen v. Spear*, 30 Vt. 545; *Seymour v. Newton*, 105 Mass. 272; *Calahan v. Babcock*, 21 Ohio St. 281; *Morris v. Shryock*, 50 Miss. 590.

Dicta to the same effect may be found in *Newhall v. Vargas*, 15 Mc. 314, and *Wood v. Yeatman*. 15 B. Mon. 270.

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On the same principle, the levy of an execution will not defeat the vendor's right: *Covell v. Hitchcock*, 23 Wend. 611. *De Chaumont v. Griffin*, cited by BRONSON, J., in *Buckley v. Furniss*, 15 Wend. 144.

All these cases evidently proceed on the general doctrine applicable to cases of stoppage, which was laid down by Chief J. SHAW, in *Stanton v. Eager*, 16 Pick. 467, namely, that a purchaser from the consignees before final and actual delivery, takes "a title to the goods, subject to the right of the vendor to stop the goods *in transitu*." It is frequently stated by the courts as the settled doctrine in cases of stoppage, that a third party can acquire no better right to the goods than the consignee himself possessed, unless he have an assignment of the bill of lading. So the carrier can not defeat the vendor's right by setting up a lien for a general balance due him from the vendee: *Oppenheim v. Russell*, 3 Bos. & Pul. 42.

The doctrine of the cases above cited was carried still farther in *O'Brien v. Norris*, 16 Md. 122, where it was held that, even a sale of the goods *in invitum*, under the attachment, did not defeat the stoppage right of the vendor, who was accordingly allowed to recover the proceeds of the sale.

Inasmuch as the vendor's right in all such cases must be exercised *in transitu*, it is pertinent to notice the circumstances under which the adverse levies were effected in the cases above cited. In *Smith v. Goss*, *Hause v. Judson*, *Hays v. Mouille*, *Aguirre v. Purmelee* and *Covell v. Hitchcock*, the goods were levied on at some interme-

diate port or station, before reaching the terminus of the transit. In *Naylor v. Devine*, they were still on board the vessel. In *Calahan v. Babcock*, they were attached after their arrival at the railroad depot, and before the consignee had exercised acts of ownership; the case much resembling the principal case in this respect. In *Morris v. Shryock*, the goods were on a wharf-boat, a warehouse somewhat similar to a railroad depot. In *Kitchen v. Spear*, the attachment was levied on the goods while still on board the railroad car.

In several of the cases, as in the Tennessee case, there were circumstances tending to show a rescission of the contract of sale. Thus, in *Cox v. Burns*, the vendor had received back the possession of the goods from the vendee before the levy of the attachment. In *Morris v. Shryock*, the vendees had declined to receive the goods, and had sent notice thereof to the vendors. In *Naylor v. Devine*, the vendor had, prior to the attachment, countermanded his order for the goods; and this was held to be a rescission when agreed to by the vendor; and the claim of a rescission was held to be not inconsistent with the vendor's claim of stoppage, both claims being asserted by attempting to resume possession of the goods in order to secure either the goods or their value.

In *Ellis v. Hunt*, 3 Term R. 464, the attachment upon the goods was sustained as paramount to the vendor's right of stoppage, it having been levied after the carrier had delivered the goods at an inn in London, which was held to be in effect a delivery to the vendee himself and a termination of the transit.

In *Parker v. McIver*, 1 Dessaus. 274, on the other hand, the vendor had exercised his right of stoppage prior to the levy of the attachment; and so also had the vendor in *Stokes v. La Riviere*, cited by counsel in 3 Term R. 466.

The dictum in *Boyd v. Mosely*, 2 Swan 661, that the right of stoppage *in transitu* would be defeated by the intervention of other *bona fide* rights, "as, if the buyer sell the goods, or they be legally attached for debt, as in the present case," evidently proceeds on an extension of the doctrine that delivery of the goods to the carrier is a delivery to the vendee, completes the sale and passes the title of the goods. It would seem to follow logically that either the vendee or his creditors may legally treat the property in all respects as vested in the vendee. And so they may for all purposes, except that of defeating the vendor's right of stoppage *in transitu*. This peculiar right, if exercised in due time, that is, before there be an actual delivery to the consignee, is favored in the law. No reason is perceived, in looking at the features of the transaction outside of the bill of lading, why the endorsement of that instrument for value should give rise to exceptional and unusual rights as against the vendor. The reasons for these exceptions to the general rule are to be found in the peculiar office and characteristics of bills of lading, which are well stated in the American notes to *Lickbarrow v. Mason*, 1 Smith's L. C., p. 889, *et seq.*

J. O. PIERCE.

Memphis, Tenn.

Supreme Court of Missouri.

' BROADWELL v. CITY OF KANSAS.

The owner of a lot abutting on a street in a city cannot recover damages from the city for consequential injuries resulting from a change in the grade of the street ; but he may recover for direct and positive injuries, such as the casting of earth upon his lot and the destruction of his building thereby.

Such an injury is a taking of private property within the meaning of the constitutional prohibition against taking such property without due compensation.

If, in raising the grade of a street, it is necessary to build a wall to restrain the earth within the limits of the street, a failure to build such wall whereby the earth rolls upon an abutting lot and injures a building, is negligence for which the city is liable. The maxim, *sic utere tuo ut alienum non lædas*, applies to municipal corporations as well as to individuals.

In a suit against the city for such negligence, the record of a judgment against the lot-owner in a suit upon tax bills issued in payment of the work of grading, is inadmissible in evidence.

APPEAL from Lafayette Circuit Court.

Action of trespass, *quare clausum fregit*, brought by Virginia Broadwell and her husband against the city of Kansas and John Halpin. On the trial the following facts appeared.

Plaintiff was the owner of a brick building situated on a lot abutting on Fifth street in the city of Kansas. In 1872 the city raised the grade of the street over twenty feet, the work being done by the defendant, Halpin, as contractor. The grade was raised by filling in the line of the street with earth, which being allowed to take its natural slope, rolled down upon the plaintiff's lot, the base of the filling extending far upon plaintiff's lot, and crushing the walls of and destroying her building. Tax bills were issued for the work of grading and delivered to the contractor who brought suit thereon against the present plaintiff and recovered judgment thereon, which was paid. Subsequently this suit was brought to recover the damages to the plaintiff's building caused by the earth thrown upon the lot.

On the trial the defendants offered in evidence the record of the judgment in the suit on the tax bills, which offer was objected to and overruled by the court.

Defendants requested the court to charge that if the city had authority to grade the street, and the street was so graded under contract, and if the work was done in the usual and ordinary way and carefully, the verdict should be for the defendants, notwithstanding the fact that the earth used took its natural slope and

rolled against and injured plaintiff's building. The court refused so to charge, and instructed the jury in substance that, if the city through its contractor, without any attempt at condemnation, cast earth upon plaintiff's lot and destroyed her building, both the city and the contractor were liable for the value of the property so taken or destroyed; but that in estimating the damages they must leave out of consideration any damages to the plaintiff's land by reason of its being left below the level of the street as graded.

Verdict and judgment for plaintiff for \$5700. The city of Kansas appealed.

Karnes & Ess and *W. Adams*, for appellant.

Frank Titus, for appellee.

The opinion of the court was delivered by

SHERWOOD, C. J.—It may be conceded at the outset, that the city would not have been answerable in this action, if it were bot-tomed on the mere fact that consequential injuries have resulted to plaintiffs because of the grading of the street by the contractor Halpin. The authorities on this point in this state, as well as else-where, are numerous and many of them are cited by counsel.

The approved doctrine on this subject, is thus sufficiently stated by a writer of recognised authority :

“The courts, by numerous decisions, in most of the states, have settled the law that municipal corporations, acting under authority conferred by the legislature *to make and repair, or to grade, level and improve streets*, if they keep within the limits of the street, and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, trespassed upon or invaded, for *consequential damages* to his premises, unless there is a provision in the charter of the corporation, or in some statute, creating the liability :” 2 Dil. Mun. Corp., sect. 990.

But in this case the action is not for *consequential* damages, but for a *direct* and positive *injury*. The contractor, Halpin, who in this behalf was the servant of the city, did not “*keep within the limits of the street.*” On the contrary, he trespassed upon and invaded private property. And for this the city is clearly answer-able, and to it in such circumstances the doctrine of *respondet*

superior applies. If the contractor, while confining himself to the area and boundaries of the street, had performed the work assigned him with reasonable care and skill, and in consequence thereof, some indirect—some consequential injury—had resulted therefrom, no action would lie, and plaintiffs would be without remedy. And to their case, according to the authorities, would be applicable that self-contradictory maxim of "*damnum absque injuria*." This case, however, involves no such circumstances as will admit of invoking that maxim—the injury, as before stated, being the immediate result of the wrongful act. And we think that the liability of the city and of the contractor may be well placed on either or both of these grounds:—

1. That the injury resulted from the work not being done with reasonable care and skill.

2. That such injury resulted from the commission of a tort.

What is reasonable care and skill is, of course, largely dependent on the surroundings of each particular case, and is therefore a relative term. But we cannot regard that as such care and skill which unnecessarily, not to say recklessly and wantonly, dumps on the premises of an adjoining proprietor large quantities of earth, covering those premises many feet in depth, crushing in the walls of and destroying a dwelling-house situated some twenty feet from the street. If upon making the fill required by the contract, it became apparent that the work could not be completed without injury, such as before mentioned, to an adjoining proprietor, *unless a wall were built to restrain the earth within the limits of the street, then such wall should have been built, and reasonable care and skill, as applicable in this connection, required that wall's construction.* The fact that statutory authority existed for doing the work did not carry with it a power to directly injure or destroy the property of an adjoining proprietor. If it were necessary to make a fill in order to grade a street, and the embankment were required to be raised so high that it would become necessary, as is sometimes the case, to make cross-embankments or supports of either earth or stone, in order to keep the principal embankment in place, no one would doubt that before the land of adjoining proprietors could be occupied by such cross-embankments, either the consent of such proprietors would have to be obtained, or else proper legal proceedings taken to condemn the required land.

And there can be no essential difference in principle between

occupying one's land with earth deposited there as the incident of making the principal embankment, and doing the same thing by making a cross-embankment. If the owner of a private lot should decide to fill it with earth, the fact that he had the legal and undoubted right thus to fill his own lot up to a certain level, would not give him the right in so doing, to dump earth on his neighbor's lot, either directly or incidentally, and we do not perceive that the city has any greater rights than would a co-terminous proprietor in similar circumstances.

In a word, the maxim, "*Sic utere tuo ut alienum non lædas*" should govern the actions of municipal corporations as well as those of individuals.

Moreover, section 16 of Article 1 of the Constitution of 1865 provided that, "No private property ought to be taken or applied to public use without just compensation." Here, the city and its servant took the property within the meaning of that section.

The taking of property within that prohibition may be either *total and absolute* or a taking *pro tanto*. "Any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation." "So a partial destruction or diminution of value of property by an act of the government which directly and not merely incidentally affects it, is to that extent an appropriation:" Cooley Const. Lim. (4th ed.) 680, *et seq*; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Hooker v. New Haven & North Hampton Co.*, 14 Conn. 146; *Arimond v. Green Bay Co.*, 31 Wis. 316; *Port Huron v. Ashley*, 35 Mich. 296; *Eaton v. Railroad Co.*, 51 N. H. 504.

So far as concerns the judgment rendered against plaintiffs on the tax-bills, we are unable to discover what relevancy such a judgment could have in the present action, since this action is for unliquidated damages, and could not have been pleaded in answer to that suit: *Mahan v. Ross*, 18 Mo. 121; *Pratt v. Menkens*, Id. 158; *Johnson v. Jones*, 16 Mo. 494. Halpin might very properly recover for the work which he had lawfully done in grading the street, and still both he and his employer, the city, be held liable for the unnecessary and direct injury done to plaintiffs' property while the work was in progress.

This cause was tried in conformity to the foregoing views, both in giving and refusing instructions, and the judgment is affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF IOWA.²COURTS OF APPEAL OF LOUISIANA.³SUPREME JUDICIAL COURT OF MASSACHUSETTS.⁴SUPREME COURT OF RHODE ISLAND.⁵

ADMIRALTY.

Limitation of Liability—Proceedings by Owner before Suit against him.—Notwithstanding Admiralty Rules, 54–57, the owner of a vessel may institute appropriate proceedings in a court of competent jurisdiction to obtain the benefit of the limitation of liability provided for by sections 4284 and 4285, Rev. Stat., without waiting for a suit to be begun against him or his vessel for the loss out of which his liability arises : *Ex parte Slayton*, S. C. U. S., Oct. Term 1881.

AGENT. See *Bank*.

Banks as Collecting Agents—Negligence of Correspondents.—Where the holder of a bill of exchange payable at a distant place deposits it with a local bank for collection, he thereby assents to the course of business of banks to collect through correspondents, and the correspondent of the local bank to which the bill is forwarded becomes his agent, and is responsible to him directly for negligence in failing to present the bill for payment within the proper time : *Guelich v. The National State Bank of Burlington*, 56 Iowa.

Voluntary Association—Contract of Committee.—A member of a voluntary association is not liable for a debt incurred by a committee of the association, if it does not appear that the member was present at the meeting appointing the committee, and there is no evidence of the authority of the committee to incur the debt : *Volger v. Ray*, 131 Mass.

ASSIGNMENT. See *Debtor and Creditor* ; *Partnership*.

ATTORNEY.

Contingent Fee—Not Recoverable.—An agreement between an attorney and client, by which the attorney is to prosecute an action for a sum of money in which he has himself no previous interest, and to receive, in case of success, one-half of the sum recovered after deducting the costs of the action, and nothing in case of failure, is unlawful and void for champerty and maintenance; and the client may maintain an action for money had and received against the attorney for the whole amount so recovered, less the costs paid by him : *Achert v. Barker*, 131 Mass.

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

² From Hon. John S. Runnells, Reporter ; to appear in 56 Iowa Reports.

³ From Hon. Frank McGloin, Reporter ; to appear in vol. 1 of his Reports.

⁴ From John Lathrop, Esq., Reporter ; to appear in 131 Massachusetts Reports.

⁵ From Arnold Green, Esq., Reporter ; to appear in 13 Rhode Island Reports.

BANK. See *Agent ; Corporation.*

Employment of Notary to protest Paper—Neglect of Notary.—A bank receiving commercial paper for collection, and placing it in the hands of a notary authorized by law to protest such paper, is not liable for the failure of the notary to perform his duty : *Britton v. Nicolls*, S. C. U. S., Oct. Term 1881.

Allen v. Merchants' Bank, 22 Wend. 215, disapproved ; *Dorchester and Milton Bank v. New England Bank*, 1 Cush. 177, followed : *Id.*

BILL OF LADING.

Issuing of, for Goods not received—Authority of Master or Shipping Agent—Invalidity in hands of bona fide Purchaser.—Neither the master of a vessel nor the shipping agents of steamboats on the rivers of the interior, at points where they receive and deliver cargo, have authority to bind the vessel or its owners by giving a bill of lading for goods or cargo not received for shipment : *Pollard v. Vinton*, S. C. U. S., Oct. Term 1881.

Such a bill of lading being outside of the power conferred by the agent's authority, is void in the hands of a person who may have afterwards in good faith taken it and advanced money on it : *Id.*

BILLS AND NOTES. See *Payment.*

Acceptance of Check—Surrender of Draft to Drawee—Discharge of Drawer.—If the payee of a draft presents and surrenders it to the drawee, and receives during business hours the latter's check for the amount thereof, which is not presented to the bank on which it is drawn until the next day, and payment is then refused, the drawer of the draft is discharged from liability thereon : *Fernald v. Bush*, 131 Mass.

CONSTITUTIONAL LAW. See *Limitations, Statute of*

Retroactive Legislation—When valid.—Courts will not readily give a retroactive effect to legislation ; but rather hold it applicable alone to the future : *Dours v. Cazentre*, 1 McGloin.

Where, however, legislation is not *ex post facto* and does not divest vested rights, impair the obligation of a contract, or otherwise violate the Constitution, it may be made retroactive : *Id.*

Penal Statute—Due Process of Law.—A statute provided that "every person who shall keep a place in which it is reported that intoxicating liquors are kept for sale without having a license therefor, * * * shall be fined not more than \$20 or imprisoned not more than thirty days, or both :"
Held, That the statute was unconstitutional and void ; both as violating the fundamental constitutional rights of property and personal freedom ; and as depriving a defendant accused under it of property and liberty without due process of law : *State v. Kartz*, 13 R. I.

Taxation—Telegraph Messages.—The imposition by a state upon every chartered telegraph company doing business within its borders, of a tax of one cent on every full rate message sent, is unconstitutional as to messages sent out of the state, and as to messages of the federal

government. As to the former it is a regulation of inter-state commerce, and as to the latter it is a tax on the means employed by the government to execute its constitutional powers: *Western Union Telegraph Co. v. State of Texas*, S. C. U. S., Oct. Term 1881.

CONTEMPT.

Justice of the Peace—Jurisdiction—Non Payment of Fine—Imprisonment.—A justice of the peace has no authority to commit a person to prison for non-payment of a fine for contempt, where the judgment imposing the fine does not provide for imprisonment; and he is liable for damages, in an action of tort, to a person so illegally committed: *Lanpher v. Dewell*, 56 Iowa.

CONTRACT.

Made by Officer of Corporation—Personal Liability on.—A contract containing the words "we promise to pay," and signed by two persons describing themselves respectively as "president school board" and "secretary school board," but which contained no reference to any school district, was held to be the personal obligation of the signers, who could not show by parol evidence that such was not in fact the intention: *Wing v. Glick*, 56 Iowa.

CORPORATION.

Ultra Vires—Railroad—Musical Festival.—It is beyond the powers of a railroad corporation chartered by the legislature, or of a corporation organized under the statute of 1870, ch. 224, for the manufacture and sale of musical instruments, to guarantee the payment of expenses of a musical festival; and no action can be maintained against either corporation upon such a guaranty, although it was made with the reasonable belief that the holding of the proposed festival would be of great pecuniary benefit to the corporation by increasing its proper business, and the festival has been held and expenses incurred in reliance upon the guaranty: *Davis v. Old Colony Railroad*, 131 Mass.

Transfer of Stock—Lien for Debt of Transferrer—Waiver of.—A statutory provision that no stockholder indebted to a bank shall transfer his stock until payment of his debt, may be waived by the bank or by its cashier acting for it by virtue of an express or implied authority: *Cecil National Bank v. Watertown Bank*, S. C. U. S., Oct. Term 1881.

The fact that the cashier was a member of the firm which owned the stock and which was indebted to the bank, will not relieve the bank from the effect of such a waiver, there being no collusion on the part of the transferee and the cashier's membership in the firm being known to the directors of the bank: *Id.*

A complete transfer of the title to the stock may be made by means of appropriate entries on the stock ledger of the bank without the issuing of a certificate to the transferee, and where the bank made such a transfer and allowed the transferee who had accepted the stock as collateral security, to rest in the belief that he had the title, it could not afterwards, upon the insolvency of the transferrer, enforce a statutory lien on the stock for the latter's debt: *Id.*

CRIMINAL LAW.

Misdemeanor by Married Woman—Proximity of Husband—Coercion.—The mere proximity of a husband not actually present when his wife commits a minor offence, will not raise in her favor the presumption that she acts under his coercion: *Stute v. Shee*, 13 R. I.

Any inference of coercion from such proximity is a question of fact: *Id.*

DAMAGES.

Breach of Contract to convey Land.—The measure of damages for the breach of a contract to convey land, where it occurs without the fault of the vendor, is the consideration paid him for the land, with interest, but if the failure occurs through his fault, the vendee may recover such consideration, or the value of the land at the time the conveyance should have been made, if greater than the consideration paid: *Yokom v. McBride*, 56 Iowa.

DEBTOR AND CREDITOR.

Assignment for Creditors—Powers given to Assignee by the deed.—A. made an assignment for the benefit of his creditors of his estate, part of which was under mortgage, and in the deed of assignment empowered the assignee to sell at public or private sale, to buy in the premises, to resell without responsibility for loss, and also to mortgage, and from the proceeds to pay, first, the creditors secured by mortgage, and then the other creditors of the assignor; *Held*, that the deed of assignment was valid as against creditors, for it did not appear that any benefit accrued to the assignor, at their expense, from the powers given: *Waldron v. Wilcox*, 13 R. I.

A plaintiff has no greater rights against the garnishee than the principal defendant debtor would have if himself suing: *Id.*

ESTOPPEL. See *Sheriff's Sale*.

EXECUTION.

Exemption—Construction of Statute—Salary.—The rule is that the property of a debtor is the common pledge of all his creditors, and exemptions, being in the nature of exceptions to the general law, will be strictly construed: *Pitard v. Carey*, 1 McGloin.

One who does work on a public building, under a contract, is not an officer within a statutory exemption of the salary of an office: *Id.*

FRAUDS, STATUTE OF.

Contract for Employment for a Year—When within Statute.—August 20th, an oral contract was made between A. & B., by which A. was to enter B.'s service for one year, A. to begin the term of service as soon as he could. A. began work for B. August 27th. *Held*, that the contract was within the Statute of Frauds, being an oral contract not to be performed within a year. *Held, further*, that an action by A. against B. for a breach of this contract could not be maintained: *Sutcliffe v. The Atlantic Mills*, 13 R. I.

HUSBAND AND WIFE. See *Criminal Law*.

INTEREST. See *Limitations, Statute of.*

INTERPLEADER.

Latent Ambiguity in Will—Uncertain Description of Legatee—Parol Evidence—Costs.—If a legatee is not described in a will with exact accuracy, and the description may, in some respects, be applicable to different persons, each of whom claims the legacy, the executor may maintain a bill of interpleader for the determination of the person to whom the legacy is payable: *Moss v. Stearns*, 131 Mass.

Extrinsic evidence of the conduct and the declarations of a testator is admissible to show his relation to, and state of feeling towards, any of the respective claimants of a legacy, where the legatee is not described with entire accuracy, and the description is in some respects applicable to each of the claimants: *Id.*

A woman who had two nephews, one named Joseph White Sprague, and the other Joseph Sprague Stearns, by her will bequeathed a legacy "to my nephew J. S. Sprague." *Held*, that the inference was that she intended Joseph White Sprague; and that, in the absence of extrinsic evidence sufficient to control this inference, he was entitled to the legacy: *Id.*

If the ambiguity of a will renders it doubtful to which of two persons a legacy shall be paid, the costs as between solicitor and client, of all parties to a bill of interpleader by the executor are to be paid out of the general estate of the testator: *Id.*

JUDGMENT.

Revival—Effect on Original Judgment—Appeal.—A judgment of revival does not validate or otherwise alter the nature or effect of the original judgment: *Weiller v. Blanks*, 1 McGloin.

The fact that a plaintiff has appealed from a judgment in his favor, not entirely satisfactory to him, does not prevent him from suing for its revival: *Id.*

Such a proceeding for revival will not prejudice his rights on appeal. *Id.*

Judgments for money are prescribed by ten years from the date of their rendition: *Id.*

The prescription in such case runs from the date of the rendition by the inferior court, and not from that of its confirmation by the appellate tribunal: *Id.*

The date of such "rendition" by the inferior court is that of the signing of the judgment by the judge thereof: *Id.*

The pendency of an appeal, even suspensive, does not stay the course of prescription against a judgment, no matter whether plaintiff or defendant be appellant: *Id.*

LANDLORD AND TENANT.

Lien for Rent—Receivership of Tenant's Property.—The lien of a landlord will not be defeated by the conversion of the property of a tenant into money by a receiver under an order of court, but will attach to the proceeds in the receiver's hands: *Gilbert v. Greenbaum*, 56 Iowa.

LIMITATIONS, STATUTE OF.

Action for False Search by Public Officer.—The action against a recorder of mortgages, for furnishing a false certificate, arises *ex contractu* and not *ex delicto*, and hence the prescription of one year does not apply: *Brown v. Penn*, 1 McGloin.

Coupons—Time when Limitation commences to Run.—The cause of action upon a coupon of a municipal bond, whether detached from the bond or not, accrues, and the statute commences to run at the maturity of the coupon: *Town of Koshkonong v. Burton*, S. C. U. S., Oct. Term 1881.

It is within the constitutional power of the legislature to require as to existing causes of action that suits for their enforcement shall be barred unless brought within a less period than that prescribed when the contract was made. The exertion of this power is, however, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law before the bar takes effect: *Id.*

If interest upon interest is allowed by the local law at the time of the contract, that right cannot be impaired by a subsequent legislative declaration as to what was, in the judgment of that department, the true intent and meaning of the statutes prescribing and limiting the rate of interest in force when the contract was made: *Id.*

Mortgage—Revival of Debt—Intervening Liens.—A note and mortgage which have become barred by the Statute of Limitations may be revived by an admission of indebtedness by the mortgagors, and the priority of the mortgage lien will thereby be preserved as against subsequent liens, taken before the mortgage became barred, and not foreclosed until after it is revived: *Day v. Baldwin*, 34 Iowa 380, distinguished; *Kerdt v. Porterfield*, 56 Iowa.

LUNATIC.

Validity of Contracts.—Persons of unsound mind will be bound by their executed contracts where such contracts are fair and reasonable and were entered into by the other parties without knowledge of the mental unsoundness, in the ordinary course of business, and where the parties cannot be placed in *statu quo*: *Abbott v. Creal*, 56 Iowa.

MORTGAGE. See *Limitations, Statute of*; *Salc.*

MUNICIPAL CORPORATION.

Performance of Public Duty—Negligence—Liability.—A private action does not lie at common law against a municipal corporation, either for the non-performance or for the negligent performance of a public duty imposed on the corporation, without its request, by general statute, unless it receives or is entitled to receive some privilege or profit in consideration of the duty: *Wixon v. City of Newport*, 13 R. I.

Nor does such an action lie when the duty, not being imposed by statute, is voluntarily assumed under and in pursuance of a general law of the state: *Id.*

The school laws of Rhode Island create a school system under which the towns are encouraged but not absolutely required to maintain public

schools. A. was injured by a defect in the heating apparatus in a public school of the city of Newport, A being a pupil in the school : *Held*, That the city was not liable for the injury suffered : *Id*.

Ordinance—Evidence—Nuisance—Use of Highway.—The courts will not take notice, *ex propria motu*, of municipal legislation ; ordinances, &c., of municipal governments must be established by proof : *Laviosa v. Chicago, St. L. and N. O. Railroad Co.*, 1 McGloin.

Where, by law, certain restrictions are placed upon the construction of awnings, sheds or other works, there is an implied authorization to erect such structures, provided the prohibition of the law be respected : *Id*.

Without general legislation, denouncing all of its special class or character as nuisance, the municipal authorities of a city cannot declare any particular thing to be a nuisance and abate it as such : *Id*.

Municipal ordinances must be reasonable and not arbitrary or oppressive, otherwise they are void ; and a railroad company may be prevented from making an unreasonable or oppressive use of a street or banquet, despite municipal legislation expressly authorizing such particular manner of use : *Id*.

NUISANCE. See *Municipal Corporation*.

ORDINANCE. See *Municipal Corporation*.

PARTNERSHIP.

Indefinite duration—Right to withdraw—Advances by Partner.—A partner of a firm formed for an indefinite time may withdraw when he pleases, and dissolve the partnership, if he acts without any fraudulent purpose ; and he is not liable to his copartner for damages caused by such withdrawal : *Fletcher v. Reed*, 131 Mass.

A partner, to whom the firm is indebted for advances made by him, is entitled, in a settlement of its affairs, to charge the firm with the amount paid by him : *Id*.

Purchase from Copartner—Knowledge of Insolvency.—The purchase by one partner of his copartner's interest, in the firm property, is not rendered void for fraud because of the fact that the buyer has knowledge of his partner's insolvency, if he had no reason to suppose it is the latter's intention to defraud his creditors by the sale : *Id*.

Interest in, when included in General Assignment.—An assignment of "all and all manner of goods, chattels, debts and effects and other estate of what kind and nature soever, and wheresoever situate, of which the assignor is the lawful owner excepting only what and so much as is exempt from attachment," conveys the assignor's interest as copartner in the property of his copartnership : *Stiness v. Pierce*, 13 R. I.

PATENT.

Bill for account of Profits merely—When Maintainable.—A bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained. Such relief can only be afforded in equity where it is incidental to some other equity, the right to enforce which

secures to the patentee his standing in court: *Root v. Lake Shore & M. S. Railway Co.*, S. C. U. S., Oct. Term 1881.

The equity to which such relief is usually incidental is the right to an injunction against infringement; but other grounds of equitable relief may arise, as where the title of the complainant is equitable, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal, and such an equity may arise out of and inhere in the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law or render his legal remedy difficult, inadequate and incomplete, and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances as furnishing a satisfactory ground of exception from the general rule: *Id.*

PAYMENT.

Acceptance of Note—When Payment—Question of Fact.—The giving and acceptance of a promissory note of a debtor for a pre-existing debt secured by a mortgage is only presumptive evidence of payment; and it is a question of fact for the jury, upon all the evidence in the case, whether the note was given and received in payment of the mortgage debt; *Dodge v. Emerson* 131 Mass.

At the trial of a writ of entry to foreclose a mortgage, the only question was whether the debt secured by the mortgage had been paid by the giving and acceptance of a new promissory note for the note secured by the mortgage. The judge in the course of his charge remarked to the jury that in the contingency of the maker of a promissory note becoming insolvent, an old note and mortgage might be more valuable than a new note and mortgage. *Held*, that the tenant had no ground of exception. *Id.*

PRACTICE.

Ex parte Decree—Unsworn Statements.—Any judicial determination arrived at without notice and an opportunity to parties opposed in interest of being heard, is null and void: *Wood v. Howard*, 1 McGloin.

In the absence of general consent, courts cannot receive unsworn statements, in lieu of formal proof; and a decree based upon such unsworn statements, will be set aside: *Id.*

RECEIVER. See *Landlord and Tenant*.

SALE. See *Trover*.

Conditional Sale in form of Lease—Mortgage by Lessee—Attachment.—A. conveyed to B. personalty under an agreement purporting to be a lease, by the terms of which certain payments were to be made by B. to A., at fixed times. In case B. failed to pay as provided, A. might take possession of the personalty. On the expiration of the lease, B. having complied with its terms, was to receive a bill of sale of the personalty; pending the lease, B. mortgaged the personalty to C. Subsequently the last payment was made by B. to A., and B. received a receipted bill of sale from A. A. immediately attached the personalty in an action against B., whereupon C. replevied the personalty. *Held*, that the so-called lease was a conditional sale. *Held, further*, that B. acquired under this conditional sale, rights of which A. could not deprive

him and which in the absence of any stipulation forbidding it, B. could sell or mortgage. *Held, further*, that on the last payment the title to the personalty vested in B., whose mortgage became valid, and took precedence of A.'s attachment: *Carpenter v. Scott*, 13 R. I.

Williams v. Briggs, 11 R. I., 476, and *Cook v. Corthell*, *Id.* 482, explained and distinguished: *Id.*

SHERIFF'S SALE.

Rescission—When Creditor Estopped—Offer to Restore.—Where a creditor participates in the distribution of the proceeds of property sold under execution, he ratifies the same and is estopped from subsequently attacking it: *Adams v. Moulton*, 1 McGloin.

Such a participation, however, if made in error of fact, might, upon proper allegations, be rescinded: *Id.*

Such rescission could only be decreed in a suit for that purpose, to which all who participated in the proceeds are made party: *Id.*

A person asking for the rescission of a contract, &c., must, as a prerequisite to his suit, return or tender what he has received from the transaction complained of, and otherwise restore, so far as possible to him, the condition of things as they stood before the contract, &c., that he attacks: *Id.*

SHIPPING.

United States Commissioners' Fees—Reshipment of Sailors.—The provision of sect. 4513, Revised Statutes, that the fee of \$2 required to be paid to the shipping commissioner for each seaman shipped, under sects. 4511 and 4512, shall not be exacted, where, on the return of the vessel, the sailor reships in the same vessel for another voyage, applies to reshipments for all voyages succeeding the first in regular order, and is not limited to the reshipment for the one voyage immediately following the one at which the fees were paid: *Young v. American Steamship Co.*, S. C. U. S., Oct. Term 1881.

STATUTE. See *Exemption*.

TAXATION. See *Constitutional Law*

TELEGRAPH. See *Constitutional Law*.

TRIAL.

Time of Introduction of Evidence.—A court may, in its discretion, allow the introduction of evidence after the arguments of counsel have been concluded: *Darland v. Rosencrans*, 56 Iowa.

TROVER.

Conditional Sale—Right of Vendor.—If a chattel is sold and delivered upon condition that it shall be paid for on a certain day, and shall remain the property of the seller until paid for, the seller has not such possession or right to immediate possession as will support an action of tort in the nature of trover, against an officer who has attached the chattel as the property of the purchaser, brought before the day named for payment: *Newhall v. Kingsbury*, 131 Mass.

Sale obtained by Fraud—Action by Vendor against Vendee—Damages.—A. sold to B. certain personalty, on credit, upon the faith of B.'s representations, which proved false and fraudulent. B. soon after the sale mortgaged the personalty to a third party and also made some payments to A. on account. *Held*, that A. could maintain trover and conversion against B. without first notifying B. that the contract of sale was rescinded, without demanding the personalty from B., and without tendering to B. the amount received in part payment. *Held*, further, that the amount received by A. as part of the consideration, was, upon his bringing trover against B., retained as part of the indemnity due from B., and was to be deducted from the amount of damages recoverable by A. from B.: *Warner v. Vallily*, 13 R. I.

In trover, the rule measuring damages is flexible. If the plaintiff has a qualified interest in the chattel converted, he will recover a sum sufficient to indemnify him, not the whole value of the chattel with interest from the time of conversion: *Id.*

ULTRA VIRES. See *Corporation*.

UNITED STATES.

Land Department—Conclusiveness of Rulings.—The courts cannot exercise any direct appellate jurisdiction over the rulings of the officers of the Land Department, nor can they reverse or correct them in a collateral proceeding between private parties founded upon them where no fraud has been practised upon the officers and they themselves are not chargeable with any fraudulent conduct: *Quimby v. Coulan*, S. C. U. S., Oct. Term 1881.

VENDOR AND VENDEE.

Vendor's Lien—Waiver of—Taking of other Security.—Where the vendor of real estate took in part payment therefor the secured note of a third person, endorsed by the vendee, it was held that he thereby waived his right to a vendor's lien, though the security taken afterward proved worthless, it being considered good by all the parties at the time it was taken: *Kendrick v. Eggleston*, 56 Iowa.

VERDICT.

Compromise Verdict.—When a verdict has been arrived at by means other than conviction of judgment on the part of the jury, this, if proven, furnishes just cause for remanding: *Dreyfus v. Lincoln*, 1 McGloin.

The mere fact that the jury has allowed plaintiff less than the evidence shows him entitled to, if his theory of the case be adopted, does not establish the fact that the verdict was a compromise one: *Id.*

Circumstantial evidence can supply the place of direct proof only when it points plainly to a particular conclusion, and when it can be reasonably explained only upon such particular theory: *Id.*

WILL. See *Interpleader*.

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THE ADOPTION OF THE COMMON LAW BY THE AMERICAN COLONIES.

THE most casual student of the jurisprudence of the several states comprising the Federal Union will observe that our whole system is predicated upon a body of laws not found in any books published on this side of the Atlantic; and a consideration of our colonial history points to the quarter in which this basis of our laws is to be found.

In *State v. Campbell*, T. U. P. Charlton (Ga.) 166, we find the following remark: "When the American Colonies were first settled by our ancestors it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither as a birthright and inheritance so much of the common law as was applicable to their local situation, and change of circumstances." This is in accordance with what was said in 2 P. Wms. 75, where the following memorandum is found, "9th August 1722, it was said by the Master of the Rolls to have been determined by the Lords of the Privy Council upon an appeal to the King in council from the foreign plantations, 1st, that if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them, and, therefore, such new-found country is to be governed by the laws of England, though after such country is inhabited by the English, Acts of Parliament made in England

without naming the foreign plantations will not bind them." 1 Blackst. 107, recognises the same principle, but falls into the curious error of treating the American plantations as a conquered nation, having pre-existing laws of its own, and that, therefore, the common law has no allowance or authority there, being subject to the control of Parliament, though not bound by any Acts of Parliament unless particularly named. Chancellor KENT, 1 Com. 472, says, "The common law so far as it is applicable to our situation and government has been recognised and adopted as one entire system by the Constitutions of Massachusetts, New York, New Jersey and Maryland. It has been assumed by the courts of justice or declared by statute, with the like modifications, as the law of the land, in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine that English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law constitute a part of the common law of this country."

Though these are correct statements of the general principle, the subject is of sufficient importance to merit a more extended discussion of the cases which have arisen in the application of the principle.

I. In the first place, it is to be noticed that the whole body of the common law, existing in England at the date of the settlement of the colonies, was not transplanted, but only so much as was applicable to the colonists in their new relations and conditions. Much of the common law related to matters which were purely local, which existed under the English political organization, or was based upon the triple relation of king, lords and commons, or those peculiar social conditions, habits and customs which have no counterpart in the New World. Such portions of the common law, not being applicable to the new conditions of the colonists, were never recognised as part of their jurisprudence.

But notwithstanding these exceptions, which are always admitted when a good reason is shown for so doing, the presumption in every case is, that the common law is the same in this country, as it was in the country of its origin, and the inapplicability of any particular portion of it must be shown before such portion will be excised from the whole body.

In *Wilford v. Grant*, Kirby's Rep. (Conn.) 114 (this is the ear-

liest volume of American reports), we have the following statement, "The common law of England we are to pay great deference to, as being a general system of improved reason, and a source from whence our principles of jurisprudence have been mostly drawn. The rules, however, which have not been made our own by adoption we are to examine, and so far vary from them as they may appear contrary to reason or unadapted to our local circumstances."

In *Powell v. Brandon*, 24 Miss. 343, the question was, whether the rule in *Shelley's Case* was a part of the law of Mississippi. In their opinion, the court showed no hesitation in declaring that it, as well as the whole body of the common law, was an integral part of their system saying, "The argument has been frequently urged by those who assign a feudal origin to the rule that inasmuch as the feudal system has been abolished the reason for the rule has ceased, and, therefore, the rule itself should be abrogated. However cogent this argument may be when addressed to the legislature, yet courts of justice cannot so far recognise its policy as to make it the basis of their decisions. Whenever a principle of the common law has been once clearly and unquestionably recognised and established, the courts of this country must enforce it, until it be repealed by the legislature, as long as there is a subject-matter for the principle to operate upon, and although the reason in the opinion of the court which induced its original establishment may have ceased to exist. This we conceive to be the established doctrine of the courts of this country in every state where the principles of the common law prevail. Were it otherwise the rules of law would be as fluctuating and unsettled as the opinions of the different judges administering them might happen to differ in relation to the existence of sufficient and valid reasons for maintaining and upholding them." In *Commonwealth v. Churchill*, 2 Metc. 123, all well-recognised maxims of the common law were declared to be a part of the law of Massachusetts, the court saying, "It is conceded to be a maxim of the common law applicable to the construction of statutes that the simple repeal of the repealing law not substituting other provisions in place of those repealed, revive the pre-existing law. As a maxim of the common law it was in force here, when the constitution of the Commonwealth was adopted. By that constitution it was declared that all the laws which have heretofore been adopted, used and approved in the colony, province or state of Massachusetts Bay, and usually practised on in the court of law, shall still

remain and be in full force until altered or repealed by the legislature. This constitution has been construed as adopting the great body of the common law with those statutes made before the emigration of our ancestors which were made in amendment of the common law, so far as these rules and principles were applicable to our condition and form of government." In *Penny v. Little*, 3 Scam. 301, Judge STEPHEN A. DOUGLASS recognised the landlord's common-law right of distress as part of the law of Illinois, in a case where the right to distrain was not expressly given in the lease. His words are worthy of quotation. "The common law is a beautiful system, containing the wisdom and experience of ages. Like the people it ruled and protected, it was simple and crude in its infancy and became enlarged, improved and polished as the nation advanced in civilization, virtue and intelligence. Adapting itself to the condition and circumstance of the people, and relying upon them for its administration, it necessarily improved as the condition of the people was elevated. Is it to be presumed then that our legislature, in adopting the common law of England, and the British statutes in its aid, prior to the Fourth of James I., intended to exclude all the improvements in the common law since that period? If we are to be restricted to the common law as it was enacted at 4 James I., rejecting all modifications and improvements which have since been made by practice and statutes, we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than two hundred years old. The reason why 4 James I. was adopted instead of the Declaration of Independence was because that was the period of the establishment of the first colonial government, and with it the common law of England as it then existed. From that period we must look to American legislation and the reports of American courts for improvements and modifications in the common law."

Goodwin v. Thompson, 2 Greene (Iowa) 329, was an action to recover damages from the defendant for aiding and abetting the marriage of the plaintiff's minor daughter, a girl of the age of fourteen years. It appearing that there was no force, fraud or imposition used upon the girl, and that the marriage was her own voluntary act, it was held that the action could not be maintained, because, by the common law which was in force in Iowa, a female of the age of twelve years could give her consent to a marriage

contract, and the later English statutes requiring the consent of parents did not extend to this country.

Stout v. Keyes, 2 Doug. 184, was an action on the case by the purchaser of a defeasible estate for the malicious cutting of timber upon it by the defendant. It was admitted that such an action could be maintained at common law, but it was contended for the defendant that the common law was not in force in Michigan. Upon this question the court said "This is a somewhat startling proposition to be seriously urged at this time, when this court as well as the Circuit Courts have been adjudicating common-law actions upon common-law rules and principles since their organization under the state government, and also the territorial courts had done so previously, from the organization of the territorial government under the Act of Congress in 1787." To the same effect is *Barlow v. Lambert*, 28 Ala. 704, where the court said: "In *Cawood's Case*, 2 Stewart 360, this court held that under the second article of the ordinance of 1787, which was afterwards made the fundamental law of this territory, the common law of England so far as applicable was made a rule of action for our government, both in civil and criminal cases. By a series of decisions running through our entire judicial history, the above doctrine has been firmly established, and it must now be admitted that the common law qualified as above is part of the law of this state."

The *lex mercatoria* so far as incorporated into English law is recognised by the American courts. If it were otherwise the law relative to negotiable paper and the days of grace given for its payment would be thrown into indescribable confusion. This very question of whether days of grace are to be allowed was raised and fairly met in *Cook v. Renick*, 19 Ill. 598, where it was said, "The allowance of days of grace is a part of the *lex mercatoria*, and the real question to be considered is, whether that is a part of the common law and adopted with it, when the common law was adopted in this state. The law merchant first originated in customs among commercial men, who by common consent adopted such rules and regulations as they found the wants and necessities of commerce required, and as commerce was extended, it spread itself over the kingdom till it became as universal as any principle of the common law. At first the courts did not take judicial notice of it, but required proof to show what it was, when they would recognise and enforce it. Soon after, however, it began to insinuate itself into

the common law, by the courts taking judicial notice of it, till its fibres became so intimately interwoven with the body of the common law itself that no one could draw the line of demarcation between the two, and the common law ever improving and adapting itself to the requirements of commerce and the wants of the subject, finally by progressive judicial decisions, the law merchant, or at least that portion of it which was of universal application throughout the realm, was recognised by the courts without proof of its existence, and from that time forth became absorbed by and really constituted a part of the common law. The law merchant then being a part of the common law of England and being of a general nature, and not local to that kingdom, is comprehended in that clause of our statute which adopts the common law." In *Piatt v. Eads*, 1 Blackf. 82, a similar conclusion was reached.

The criminal law of England is the basis of the criminal law of this country. In *Fuller v. State*, 1 Blackf. 66, it was held that an indictment for murder could be maintained in Indiana at common law, as well as upon their statute, and therefore that the fact of the indictment concluding *contra formam legis* instead of *contra formam statuti* was immaterial. In the same case the accused having been convicted endeavored to obtain "the benefit of clergy." But this claim was disposed of by the court in the following opinion: "The benefit of clergy never was properly a common-law privilege. It originated with that of sanctuary in the gloomy times of popery. It was the offspring of that absurd and superstitious veneration for a privileged order in society, which unfortunately existed in those ages of darkness when the persons of clergymen were considered sacred, and churchyards were viewed as consecrated ground. The statutes of England on the subject are local to that kingdom. They were not made in and of the common law, and are certainly not adopted as the laws of our country." This subject early came under the attention of the Pennsylvania courts, and in *Shewell v. Fell*, 3 Yeates 17, we find SHIPPEN, C. J., saying, "The common law and such of the statute laws of England as were enacted before the settlement of the late province, applicable to our local situation, have been adopted here both before and since the Revolution. They form part of our code, under certain modifications sanctioned by the judicial authority. The English decisions, however, do not universally comport with our circumstances. It is the province of the court to judge in what cases the rules of the

English common law should be relaxed. Should juries assume this power, the necessary consequence would be, that the utmost uncertainty must ensue from the fluctuating opinions of different sets of jurors in different countries."

A clearer comprehension of this branch of the subject, however, may be obtained by the consideration of the cases in which certain portions of the common law have been declared inapplicable to our conditions of society or general circumstances. In *Boyer v. Sweet*, 3 Scam. 120, book entries for goods sold and delivered, made by the plaintiff who kept no clerk, were admitted in evidence to charge the defendant, the court saying, "On the argument it was urged by the counsel for the defendant that, inasmuch as we have adopted the common law of England, we have adopted, likewise, all its uses, and that resort must be had to the decisions of the British courts to ascertain what is the rule in any given case wherein the legislature has not provided one. It is true, we have, like most other states in the union, adopted the common law by legislative act, but it must be understood only in cases where that law is applicable to the habits and conditions of our society, and in harmony with the genius, spirit and objects of our institutions. Generally, too, the decisions of these courts furnish strong evidence of what the common law is, but it is equally true, that they have made many innovations upon its original principles, and refining upon the adjudications of one another, many of them have become much modified or wholly changed. The courts of the several states have also taken advantage of its pliant nature, in which consists one of its greatest excellencies, and adapted it to the ever varying exigencies of the country and to the ever changing condition of society. Some rules of the common law suited to a highly refined and luxurious people, where every description of business is reduced to a system, and minute division of labor exists, may be very ill adapted to a community differently situated. There are some great leading principles, some fundamental rules which are never departed from, being founded in the common reason of every man, and which no change of his condition can alter." The same conclusion was reached in *Poultney v. Ross*, 1 Dall. 238. In *Lindsley v. Coats*, 1 Ohio 243, the question was whether a good title to land could be obtained by simple livery of seisin as at common law, without any deed or written muniment of title, and the court said, "It has been repeatedly deter-

mined by the courts of this state that they will adopt the principles of the common law as the rules of decision, so far only as these principles are adapted to our circumstances, state of society and form of government. In no instance have the ancient common-law modes of conveyance, as such, been adopted in this state, and long anterior to the settlement of this country they had given way to the comparatively modern mode of assurance by deeds of lease and release." Upon the subject of what are to be considered as navigable rivers, the English rule that only those were to be regarded as such in which the tide ebbed and flowed, was early disregarded in the Pennsylvania cases, as inapplicable to the great tideless streams which traverse vast extents of our territory: *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. 71. In *Morgan v. King*, 30 Barb. 9, there is a learned discussion of the same subject, the court holding that the Racket river was navigable, saying, "The principles of the common law, as its theory assumes, and its history proves, are not exclusively applicable or suited to our country or condition of society; but on the contrary, by reason of its property of expansibility and flexibility, their application to many is practicable. The adoption of the common law, in the most general terms by the government of any country, would not necessarily require or admit of an unqualified application of all its rules without regard to local circumstances, however well settled and generally received these rules might be. Its rules are modified upon its own principles, and not in violation of them. When it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the unwritten law of England, and we have adopted it as a constantly improving science, as an art or a system of legal logic, rather than as a code of rules. In short, in adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed." So, also, on the wide prairies of the West, the reason of the English rule that every owner of cattle is bound to keep them fenced in upon his own premises, was deemed to have ceased. The rule was, therefore, abandoned, and the doctrine enunciated, that if one desired to protect his crops from trea-

passing cattle, he must separate his field from the prairie where the cattle grazed at large. In *Wagner v. Bissell*, 3 Iowa 396, the court, after admitting that at common law the principle was well settled, said, "We are then led to inquire whether independent of any statutory provision, this rule is applicable to our condition and circumstances as a people, and if it is, then whether it has or has not been changed by legislative action. Unlike many of the states we have no statute declaring in express terms the common law to be in force in this state. That it is, however, has been frequently decided by this court, and does not, perhaps, admit of controversy. But while this is true, it must be understood, that it is adopted only so far as it is applicable to us as a people, and may be of a general nature." The reason of the inapplicability of the English rule is thus stated in *Secley v. Peters*, 5 Gilman 150, "Admitting that at common law the owner of a close was not bound to fence against the adjoining close except by force of prescription, yet, in adopting the common law it must be understood only in cases where that law is applicable to the habits and condition of our society, and in harmony with the genius, spirit and objects of our institutions. However well the rule of the common law may be suited to a densely populated country like England, it is surely but ill-adapted to a new country like ours. The wide prairies and scarcity of timber are a sufficient reason for the non-existence of this rule. He who desires to protect his crops must fence them in himself." In *Norris v. Harris*, 15 Cal. 226, it was argued that, though the common law was incorporated into the common law of the original colonies, it was not part of the law of the western states. Mr. Justice FIELD (now of the Supreme Court of the United States), conclusively sets at rest this doubt in his opinion, saying, "There is no doubt that the common law is the basis of the laws of those states which were originally colonies of England, or carved out of such colonies. It was imported by the colonists and established so far as it was applicable to their institutions and circumstances, and was claimed by the Congress of the United Colonies in 1774 as a branch of those indubitable rights and liberties to which the respective colonies were entitled. In all the states thus having a common origin formed from colonies which constituted a part of the same empire, and which recognised the common law as the source of their jurisprudence, it must be presumed that such common law exists. A similar presumption

must prevail as to the existence of the common law in those states which have been established in territory acquired since the Revolution, where such territory was not at the time of its acquisition occupied by an organized and civilized community, where, in fact, the population of the new state upon the establishment of government was formed by emigration from the original states. As in British colonies established in uncultivated regions by emigration from the parent country, the subjects are considered as carrying with them the common law so far as it is applicable to their new situation. So, when American citizens emigrate into territory which is unoccupied by civilized man, and commence the formation of a new government, they are equally considered as carrying with them so much of the same common law in its modified and improved condition under the influence of modern civilization and republican principles, as is suited to their new condition and wants. But no such presumption can apply to states in which a government already existed at the time of their accession to the country, as Florida, Louisiana and Texas. They had already laws of their own, which remained in force until, by the proper authority, they were abrogated and new laws were promulgated. With them there is no more presumption of the existence of the common law than of any other law."

But though the jurisprudence of England, as administered through common-law forms, has been incorporated into the body of the American law without much dispute, the remedies enforced in the ecclesiastical courts were not so willingly accepted as within the jurisdiction of our purely secular courts, in a country where matters ecclesiastical are left entirely to church judicatories independent of the state. If, however, all these matters which in England at the time of the settlement of the American colonies were solely cognisable in the courts ecclesiastical, are not within the jurisdiction of our courts, many most flagrant civil injuries would be without a remedy. For in England, many matters purely civil in their nature are within the exclusive jurisdiction of the ecclesiastical courts. For example, all cases arising out of the contract of marriage, in consequence of the old view that this relation was of a purely religious character, were only cognisable in courts presided over by ecclesiastics. In America, where the contract of marriage is purely a civil contract, and where no ecclesiastical courts exist to take cognisance of such cases, breaches

of marital rights would be remediless if the ordinary civil courts had not jurisdiction of such causes. In many of the states, statutory enactments incorporating *in extenso* the main provisions of the English law, and designating the proper courts for the exercise of this jurisdiction, have removed all difficulty and confusion from the subject. But apart from these statutes, it has been decided that our civil courts have jurisdiction of cases in which rights of person or property are involved, which in England are solely within the jurisdiction of the ecclesiastical courts. In *Short v. Stotts*, 58 Ind. 29, there is a very interesting discussion of the struggle which took place in England between the courts of common law and the ecclesiastical courts for jurisdiction over cases arising out of the contract of marriage. The action was one for damages for breach of promise to marry. The defendant denied that the courts of common law in Indiana could take cognisance of such an action. His position, as stated in the opinion of the court, is as follows: "The only law governing this state is: 1. The Constitution of the United States and of this state; 2. All statutes of the General Assembly of the state in force and not inconsistent with such constitutions; 3. All statutes of the United States in force and relating to subjects over which Congress has power to legislate for the states and not inconsistent with the Constitution of the U. S.; 4. The common law of England and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James I., which are of a general nature and not local to that kingdom, * * * that as the sources of our law are as above stated, and as neither the common law of England nor any statute made in aid thereof prior to the period mentioned (1607), authorized such action, it follows we have no law which authorizes the action, * * * that prior to the year 1607, the contract for marriage was one exclusively of ecclesiastical and not of common-law jurisdiction, and that prior to that time, no action had been maintained in a common-law court for the breach of such contract." The court, in a very carefully considered opinion, sustain their jurisdiction over this action upon the ground that though prior to 1607 no case can be found in English common-law courts where the action was maintained, yet that by the principles of the common law which existed long anterior to 1607, an action for the breach of a contract for marriage will lie. In *Crump v. Morgan*, 3 Ired. Eq. 91, there is a very elaborate and learned discussion of the question

whether a court of equity, without statutory authority, could declare void the marriage of a female lunatic, which had been procured in order that the husband might obtain possession of her large estate. The decisions of English ecclesiastical courts having been cited in support of the jurisdiction, it was argued that they had no force in American civil courts. The court unhesitatingly disposed of the objection to the jurisdiction, saying: "It is said that these are the adjudications of ecclesiastical courts and are founded not in the common law, but in the canon and civil laws, and therefore not entitled to respect here. But it is an entire mistake to say that the canon and civil laws, as administered in the ecclesiastical courts of England, are not part of the common law. Blackstone, following Lord HALE, classes them among the unwritten laws of England, and as parts of the common law which by custom are adopted and used in peculiar jurisdictions. They were brought here by our ancestors as parts of the common law and have been adopted and used here in all cases to which they were applicable, and whenever there has been a tribunal exercising a jurisdiction to call for their use. They govern testamentary cases and matrimonial cases. Probate and re-probate of will stand upon the same grounds here as in England, unless so far as statutes may have altered it:" *Wightman v. Wightman*, 4 Johns. Ch. 343, repeated the same doctrine, and held further that where by statute jurisdiction is given to any particular court over matters either matrimonial or testamentary, the English law is still to be consulted as a guide in matters relating to the general subject, for which particular provision is not made in the statute. To the same effect is *Williamson v. Williamson*, 1 Johns. Ch. 489, where upon a libel for divorce for adultery, the question was whether the facts having been proved, the granting of a final decree dissolving the marriage was within the sound discretion of the court. The same learned judge said: "The statute says that after the truth of the adultery charged has been ascertained, 'it shall be lawful for the court to decree a dissolution of the marriage.' This language may and ought to be understood as leaving to the court the exercise of that sound discretion which the nature of the case and the principles of equity might require. The general rules of the English jurisprudence on this subject must be considered as applicable under the regulations of the statute to this newly-created branch of equity jurisdiction." This doctrine is still more strikingly ex-

emplified in *LeBarron v. LeBarron*, 35 Vt. 365, where in a proceeding for divorce by the wife for the alleged impotence of the husband, the petitioner asked for a physical examination of the respondent by medical experts. The application was resisted upon the ground that the statutes relating to divorce contained no provision for such an examination, but the court granted the application, POLAND, C. J., saying: "To enable us to determine this question, it becomes necessary to examine into the real source and extent of the jurisdiction of the court over this subject. The legal power to annul marriages has been recognised as existing in England from a very early period, but its administration, instead of being committed to the common-law courts, was exercised by their spiritual or ecclesiastical courts. Under the administration of these courts for a long period of time, the principles and practice governing this head of their jurisdiction ripened into a settled course and body of jurisprudence, like that of the courts of chancery and admiralty, and constituted with these systems a part of the general law of the realm, and in the broad and enlarged use of the term, a part of the common law of the land. This country having been settled by colonies from England under the general authority of the government, and remaining for many years a part of its dominion, became and remained subject and entitled to the general laws of the government, and they became equally the laws of this country, except so far as they were inapplicable to the new relation and condition of things. This we understand to be well settled, both by judicial decision and the authority of eminent law writers. But if this were not so, the adoption of the common law of England by the legislature of the state was an adoption of the whole body of the law of that country, aside from their parliamentary legislation, and included those principles of law administered by the courts of chancery and admiralty, and the ecclesiastical courts (so far as the same were applicable to our local situation and circumstances and not repugnant to our constitution and laws), as well as that portion of their laws administered by the ordinary and common tribunals. As the jurisdiction in cases matrimonial in England was exclusively committed to the spiritual courts, and had never been exercised by the ordinary law courts, the same could not be exercised by the courts of law in this country until it was vested in them by the law-making power. As we have never had any ecclesiastical

courts in this country who could execute this branch of the law, it was in abeyance until some tribunal was properly clothed with jurisdiction over it or vested in the legislature. It was probably on this ground that the legislatures of the states proceeded in granting divorces as many of them did in former times. When the legislature establish a tribunal to exercise this jurisdiction or invest it in any of the already established courts, such tribunal becomes entitled, and it is their duty to exercise it according to the general principles of the common law of the subject and the practice of the English courts so far as they are suited to our condition and the general spirit of our laws." The order for physical examination was granted. Similar orders upon similar grounds were granted in *Newell v. Newell*, 9 Paige 25, and in *Devanbagh v. Devanbagh*, 5 Id. 554.

It must be noticed, however, that in the federal courts a different rule has been adopted relating to criminal offences from that adopted in the state courts. In such matters the jurisdiction rests entirely upon the Constitution of the United States and Acts of Congress. This was early declared in *The United States v. Worrall*, 2 Dall. 384, where Justice CHASE said: "It is attempted, however, to supply the silence of the Constitution and statutes of the Union by resorting to the common law for a definition and punishment of the offence which has been committed. But in my opinion the United States, as a federal government, have no common law, and consequently no indictment can be maintained in their courts for offences merely at the common law. If, indeed, the United States can be supposed for a moment to have a common law, it must, I presume, be that of England, and yet it is impossible to trace when or how the system was adopted or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers as by the judges and lawyers of England, that they brought hither, as a birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself what parts of the common law were applicable to its new condition, and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others. Hence, he who shall travel through the different states will soon discover that the whole of the common law of England

has been nowhere introduced; that some states have rejected what others have adopted, and that there is, in short, a great and essential diversity in the subjects to which the common law is applied as well as in the extent of its application." This conclusion that there is no federal common law in criminal cases has been followed in numerous cases to be found in the federal reports, the proper consideration of which would require a separate article.

Another important question is, how far are British statutes, passed before the settlement of this country, to be recognised as part of our common law. This subject was most carefully considered by the judges of the Supreme Court of Pennsylvania in 1807, whose report is found in the appendix to 3 Binney. Of this report Mr. Binney says: "In many respects it deserves to be placed by the side of judicial decisions, being the result of very great research and deliberation by the judges, and of their united opinion. It may not, perhaps, be considered as authoritative as judicial precedent, but it approaches so nearly to it that a safer guide in practice or a more respectable, not to say decisive, authority in argument cannot be wanted by the profession." In this report this general principle was stated, that such English statutes passed before the settlement of the colony as were applicable to the emigrants in their new situation were in force, but such statutes as related to the king's prerogative, the rights and privileges of the nobility and clergy, the local commerce and revenue of England, and other subjects unnecessary to enumerate, were improper to be extended to Pennsylvania. With respect to statutes enacted since the settlement of Pennsylvania, it was assumed as a principle that they do not extend here, unless they have been recognised by an Act of Assembly, or adopted by long continued practice in courts of justice. Of the latter description, there are very few, and those, it is supposed, were introduced from a sense of their evident utility. As English statutes they had no obligatory force, but from long practice they may be considered as incorporated with the law of our country. A similar report was prepared in Maryland by Chancellor KILBY in 1794. In Massachusetts the question was raised in *Sackett v. Sackett*, 8 Pick. 309, whether the Statute of Gloucester, 6 Edw. I., c. 5, giving an action of waste against tenants for life was in force in that state, or to be considered part of the common law of the land. PARKER, C. J., said: "Our ancestors came to this country, bringing with them, as all agree, the

rights and privileges of Englishmen and the common law of that country, so far as it should be found applicable to their new state and condition. They brought with them also a charter containing power to make such new laws as their exigencies might require. They could live under the old law or make new ones. Whenever they legislated upon any subject their own law regulated them; when they did not legislate, the law they brought with them was the rule of conduct. Then the question is, whether the law by which they would be governed in relation to waste committed by tenants was the ancient common law as it stood before the Statute of Marlebridge, or as modified by that statute, or the law which was in force in England at the time of their emigration, and for centuries before, and we think it very clear that it was the latter, it would seem exceedingly strange that their coming over to this country should operate as a repeal of either of these ancient statutes, so as to reinstate the law as it existed in the time of Henry III., which had been abrogated three or four centuries and was found inconvenient in the reign of that prince." The same doctrine was declared in *Bruce v. Wood*, 1 Metc. 542, where the court said, the Statute of 32 Henry VIII., c. 28, which gives the wife and her heirs a right of entry after the decease of her husband, having been passed before the emigration of our ancestors, must be taken to be a modification and amendment of the common law in force here. But all British statutes which are in conflict with our Constitution and laws, or with the general spirit of our institutions, are unhesitatingly disregarded by the American courts whenever any right is claimed dependent upon them. Such was the Statute of 9 George I., commonly known as the "Black Act," for the suppression of poaching. In *State v. Campbell*, T. U. P. Charlton 666, the Supreme Court of Georgia said: "That statute never could have been in force, because it, as is discoverable from the preamble and the context, is founded upon a tender solicitude for the amusement and property of the aristocracy of England. It was made to protect from the violation or profanation of the people the forest of his majesty or the park of the peer. How then could it apply to a country which was but one extended forest, in which the liberty of killing a deer or cutting down a tree was as unrestrained as the natural rights of the deer to rove or the tree to grow. In this view of the statute there was nothing left for its provisions to operate upon in this

state. It was therefore a local statute, fit only for the internal polity of England."

It has been argued in some of the western states that whatever recognition may be given to British statutes in the states which have grown out of the original colonies, no place should be given to them in the virgin jurisprudence of the west. But this contention met with proper reprobation in *Hamilton v. Kneeland*, 1 Nevada 40, the court saying: "The rule of the common law that a condition cannot be reserved to any but the grantor and his heirs, I think has never been recognised as the law in this country, and it was completely overturned in England by the Statute 32 Henry VIII., c. 34, and in adopting the common law of England in this country it seems to be the established doctrine that it is adopted as amended or altered by English statutes in force at the time of the emigration of our colonial ancestors. But counsel argue that this doctrine embraces only the original states. The authorities recognise no such limitation, and upon principle there ought to be none. When the common law of England, consisting in part of statutes, as we have shown, has been adopted in the United States, why may not Americans, like the adventurous emigrants of other nationalities, carry with them the common law of their country into the territories acquired since the Revolution?"

The territorial legislature of Iowa, by the Act of 1840, provided that none of the statutes of Great Britain should be in force as part of the law of the territory, but in *O'Farrall v. Simplot*, 4 Iowa 381, this was interpreted so as only to apply to statutes of the United Kingdom, passed since the union with Scotland at the accession of James I. This period coincides very nearly with the date fixed by the constitutions and codes of many of the states, at which the country is reckoned to have been settled, and when the common law was transplanted from British to American soil. Nearly all the states which were formed out of what was formerly known as the Northwest Territory have fixed upon 4 James I., A. D. 1607, the year of the founding of Jamestown. The selection was natural, in view of the former intimate relations existing between Virginia and the Northwest Territory. Of course, the original colonies each take the date of their own settlement. But in *Coburn v. Harvey*, 18 Wis. 147, the year of our independence is taken as the date. This exceptional doctrine is justified upon the following grounds, stated in the opinion of the court: "The

Revolution, in the case of the western states, should be taken as the time of the emigration of our ancestors from whence the statutes work. Chancellor KENT states that it is the established doctrine that English statutes passed before the emigration of our ancestors in amendment of the law constituted a part of the common law of this country. The phrase 'emigration of our ancestors' is too indefinite to establish any fixed time which excluded subsequent English statutes from being considered a part of the common law of some at least of the colonies. For our ancestors did not all emigrate, nor were the colonies all established at any one time. And the reason given for adopting the common law with all the statutes amending it prior to a certain time, and excluding statutes passed afterwards unless expressly adopted, precludes the idea of fixing the same time for all the colonies. It is very obvious that in applying the general principle each colony would fix the beginning of its colonial existence as the dividing line between those English statutes which were and those which were not a part of its common law, and we have come to the conclusion that in applying the general rule to a state which like this had no political existence before the Revolution, it must, in harmony with the reasoning of these cases, be held that when our territorial legislature and the framers of our Constitution recognised the existence here of the common law, they must be held to have had reference to that law as it existed, modified and amended by English statutes passed prior to the Revolution. As before shown, there was no one time applicable to all the colonies, and there is no reason to assume that we should adopt the commencement of one colony rather than another as the time applicable to us. The Revolution itself is the dividing line which the reasoning of these cases would suggest for us."

A judicial discussion of this question, however, has become unnecessary in most of the states organized since the Revolution, by the statutory provision before mentioned, fixing the year 1607 as the date. The jurisprudence of some of the western states can never be properly understood by one unmindful of their early settlement by non-English speaking nations. Therefore over a great portion of the Northwestern Territory, as well as the trans-Mississippi territories, the French or Spanish laws prevailed. Upon, however, the acquisition of these various territories, by statutory enactment, the former law was abolished and the common law substituted.

This is admitted in *Lyman v. Bennett*, 8 Mich. 18, where the court said: "It is undoubtedly true that at one time the Custom of Paris was in force here. It was expressly abrogated by the territorial legislature in 1810, and probably applied to very few cases then, if to any. Practically the common law has prevailed here in ordinary matters since our government took possession, and the country has grown up under it. How or by what particular means it originated would open an inquiry more curious than useful. A custom which is as old as the American settlements, and has been universally recognised by every department of government, has made it the law of the land if not made so otherwise. Our statutes, without this substratum, would not only fail to provide for the great mass of affairs, but would lack the means of safe construction. We are of opinion that questions of property not clearly excepted from it must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs." And in *Reaume v. Chambers*, 22 Mo. 36, it was said: "Prior to 1816 the Spanish law was the law of Missouri, then the common law was introduced by statute. After the introduction of the common law, the Spanish law no longer had any existence here. It has only been regarded in the interpretation of contracts which had been made before its abrogation, and on the adjustment of rights which had accrued prior to the introduction of the common law, just as we would look at this day to the laws of Spain in interpreting a contract which had been made in that kingdom." It must be always borne in mind, however, that the law of Louisiana is an exception to the general rule, and that the civil law introduced by the early settlers still remains the basis of the jurisprudence of that state.

The various courts of this country are constantly called upon to settle controversies whose determination is dependent upon the law of sister states. In such cases either party is at liberty to produce evidence of the law of another state upon any given subject by the oral testimony or deposition of those skilled in the profession; but in the absence of such testimony, it is important to notice that the presumption is that the common law exists in a sister state in the condition it was at the settlement of that state: *Thurston v. Percival*, 1 Pick. 415; *Brown v. Pratt*, 3 Jones, N. C. Eq. 202; *Inge v. Murphy*, 10 Ala. 885; *High's Appeal*, 2 Doug. 515; *Shepherd v. Nabors*, 6 Ala. 631; *Crouch v. Hall*, 15 Ill. 263.

It may be worth while to notice that this statement of the law differs from that sometimes made, that, in the absence of proof, the law of sister states will be presumed to be the same as the law of the forum. This is not so, because the common law of the forum may have been altered by statute, and there is no presumption that other states have passed statutes similar to those passed by the legislature of the state in which the action is brought. The true presumption is, that in the absence of proof to the contrary, the common law exists unaltered in a sister state.

But though the common law has been incorporated into the general system of our laws, it is within the power of the legislature to alter or amend it at their discretion. A contention to the contrary was disposed of in *Noonan v. State*, 1 Smedes & Marshall 562. "That the common law, like the common atmosphere around every living being, is gladly received by all framers of government, is certainly very true, but that it was adopted to remain perpetual, unaltered and unalterable, and not to be tempered to our habits, wants and customs, we conceive was never designed by the wisdom of those who established our fundamental law." The following quotation from the opinion of the court in *Marks v. Norris*, 4 Hen. & Munf. 465, may not be out of place as a concluding paragraph. "While I have not less respect for English judges and English opinions than other gentlemen, yet I have too much regard for myself, and the national character of my country, to rely upon English books further than for information merely, but not as authority; it was the common law we adopted and not English decisions, and we should take the standard of that law, namely, that we should live honestly, should hurt nobody, and should render to every one his due, for our judicial guide."

The following extracts from the codes of several of the states have an immediate bearing upon the subject under discussion:

Arkansas: Rev. Stat. 1874, sect. 772. "The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British Parliament, in aid of or to supply the defects of the common law, made prior to the fourth year of James I., that are applicable to our form of government, of a general nature, and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the General Assembly of this state."

California : Act of April 13th 1850, Gen. Laws, p. 599. "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the state of California, shall be the rule of decision in all the courts of this state."

Illinois : Rev. Stat. 1874, ch 28, sect. 1. "That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of or to supply the defects of the common law prior to the fourth year of James I., excepting the second section of the sixth chapter of 43 Elizabeth, the eighth chapter of 13 Elizabeth, and the ninth chapter of 37 Henry VIII., and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."

Indiana : Act of 31st May 1852, is in the same words as the Illinois act, *supra*.

Kansas : Rev. Stat. 1868, ch. 119, sect. 3. "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people shall remain in force in aid of the general statutes of the state."

Missouri : Rev. Stat. 1870, ch. 86, sect. 1. "The common law of England and all statutes and Acts of Parliament made prior to the fourth year of the reign of James I., and which are of a general nature not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any law, custom or usage to the contrary notwithstanding."

Nebraska : Rev. Stat. 1873, sect. 1. "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, the constitution of this state or with any law passed or to be passed by the legislature thereof is adopted and declared to be the law within this state."

North Carolina : Code 1855, ch. 22. "All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of or repugnant to, or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has not

been otherwise provided for in the whole or in part, not abrogated, repealed or become obsolete, are hereby declared to be in full force within the state."

Vermont: ch. 32, General Statutes of 1870. "So much of the common law of England as is applicable to the local situation and circumstances, and is not repugnant to the constitution or laws of this state, shall be deemed and considered law in this state, and all courts are to take notice thereof and govern themselves accordingly."

Virginia: Code 1860, p. 112, sect. 1. "The common law of England, so far as it is not repugnant to the principles of the Constitution of this state shall continue in force within the same, and the right and benefit of all writs, remedial and judicial, given by any statute or Act of Parliament made in aid of the common law prior to the fourth year of the reign of James I., of a general nature and not local to England, shall still be served so far as the same may consist with the Constitution of this state."

Wisconsin: Constitution, sect. 13. "Such parts of the common law as are now in force in the territory of Wisconsin not inconsistent with this Constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

RICHARD C. DALE.

RECENT ENGLISH DECISIONS.

High Court of Justice. Queen's Bench Division.

WALKER v. MATTHEWS.

The *bona fide* purchaser in market overt of stolen cattle acquires a property therein, good until conviction of the thief, and, therefore, cannot set up against the owner after conviction a claim for keeping the animals before that event, still less for wrongfully keeping them afterwards.

APPEAL from the Huntington County Court.

The plaintiff claimed the delivery of two cows and two calves, valued at 45*l*. The defendant counter-claimed for the keep of the cows and calves during the time they were in his possession.

At the trial before the county court judge the following facts were proved: The two cows, then in calf, were, on the 7th of June 1880, stolen from the plaintiff. On the 11th of June, the

thief sold them in market overt to a cattle dealer who, on the 16th of June, sold them to the defendant, a *bona fide* purchaser, who had no notice of the felony. The plaintiff traced the cows and, on the 21st of June, claimed them of the defendant, but he refused to give them up. On the 5th of April 1881 the thief was convicted of having stolen the cows, and on the 9th of April the defendant received notice of such conviction, and the cows were again demanded of him. The cows both calved while in defendant's possession. The jury, under the direction of the county court judge, found a verdict for the plaintiff on the claim, and for the defendant on the counter-claim. A rule having been obtained to enter judgment for the plaintiff on the counter-claim,

Cockerell, for the defendant, showed cause.—On the conviction of the thief the property in the goods reverted in the plaintiff: 24 & 25 Vict. c. 96, § 100; *Scattergood v. Sylvester*, 15 Q. B. 506; but until that time the defendant did not wrongfully detain the cattle, and he is entitled to deduct the expenses of their keep during such period. [LOPES, J.—He cannot recover the expenses of keeping his own property; still less can he those of keeping that which he held wrongfully.]

W. Garth, for the plaintiff, was not called on.

The court, GROVE and LOPES, JJ., held that the defendant could not recover on his counter-claim, but that judgment thereon must be entered for the plaintiff.

Rule absolute.

As the law of market overt does not obtain in this country, as is well known, the purchaser of stolen property does not, with us, acquire any title as against the lawful owner, even before the conviction of the thief. Therefore, as the buyer never becomes the owner, the precise question involved in *Walker v. Matthews* never could arise with us; but a similar question may arise upon other state of facts, viz.: whether services rendered by A. in keeping, preserving or improving property in which he has a special, limited or temporary ownership or

interest, ordinarily furnish ground for a claim of payment against the general or absolute owner; and second, whether such services bestowed upon property to which one has no title whatever, but to which he made a *bona fide* claim of title, and rendered the service because of such claim and belief, furnish any better cause of action.

An illustration of the first occurs where A. sells goods to B. and retains possession until paid for, and in the meantime incurs expense in keeping or storing the same. Does this give him any claim

at common law, and independent of custom and usage, for remuneration by the buyer for keeping? Apparently not. The services in such case are rendered not at the request, express or implied, of the buyer, and not even for his benefit, except remotely. The goods are kept and the expenses incurred solely for the benefit of the seller, and adversely rather than otherwise, to the interests of the buyer. To compel him, therefore, to pay for them would be contrary to every elementary principle. Certain it is that in such cases the seller has no *lien* on the goods for the expenses of keeping, as he would have for the contract price. See *British Empire Shipping Co. v. Somerset, El. & El.* 353, affirmed in House of Lords, 8 H. L. C. 338. And see *Hartley v. Hitchcock*, 1 Stark. 408; *McIntyre v. Carver*, 2 W. & S. 392.

The second question is, whether the common law gives a person, who expends time and money on property which he supposes to be his, any ground for remuneration from the real owner, when once ascertained, and who thus usually derives more or less benefit from the other's expenditure. Probably this arises most frequently in regard to real estate, and the rule seems to be well settled that, at common law and independent of statute, the real owner is not liable.

And undoubtedly the result thus reached led to the enactment of the "betterment laws," as they are usually termed, giving the party incurring the

expense or making the improvements upon real estate under a *bona fide* belief of title some mode of redress, either by way of lien or otherwise, against the real owner, or at least against the property itself.

But the common law, in such cases, not only did not create *any implied* contract or liability on the part of the real owner, but even held him not bound by his subsequent express promise to pay for the improvements. Being rendered without his request, express or implied, they constituted a past or executed consideration, as it is called, and so the promise was not legally supported: *Frear v. Hardenbergh*, 5 Johns. 272. Therefore, persons who take possession of government land without right—squatters—cannot maintain an action to recover of the rightful owner for the improvements made thereon, although the defendant has afterwards promised to pay for them: *Carson v. Clark*, 1 Scam. 113; *Hutson v. Overturf*, Id. 170; *Roberts v. Garen*, Id. 396; *Townsend v. Briggs*, Id. 472; *McFarland v. Mathis*, 5 Eng. (Ark.) 560. If A. performs work for B. on land owned by B.'s wife, but solely on B.'s personal credit and not as agent for his wife, and the wife subsequently gives her note for the labor, she is not liable therefor, simply because the work was not done at her request or by her authority; *Morse v. Mason*, 103 Mass. 560.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of Missouri.

SHARPE v. JOHNSTONE.

In an action for malicious prosecution although it appears that the prosecutor communicated to counsel all the facts and followed the latter's advice, yet if notwithstanding such advice he believed the prosecution must fail, and was actuated in commencing it by a desire to injure and wrong the accused, he is liable.

If there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable. The proof of malice does not establish the want of probable cause, nor does the want of probable cause necessarily establish the existence of malice. That is to say, malice is not an inference of law from the want of probable cause.

Malice, however, may be inferred from the facts which go to establish the want of probable cause, but this inference is a question of law for the court, and not a question of fact for the jury.

Where the accused is discharged by the committing magistrate, and the prosecutor afterwards procures him to be indicted for the same offence, the indictment is a second and independent prosecution for which damages may be recovered in addition to those recovered for the first prosecution; but if the prosecutor is summoned before the grand jury without his procurement, he is not liable for damages as for a second prosecution.

Where two indictments are successively found for the same offence, and on account of some formal defect in the first it is quashed and the prisoner tried and acquitted on the second, the two cannot, in an action for malicious prosecution, be considered as two separate prosecutions.

FROM St. Louis Court of Appeals.

This was an action for malicious prosecution. The plaintiff in 1869 had entered into an arrangement with defendants, by which defendants were to ship him mules which he was to sell, receiving for his services one-third the net profits. After some time a settlement was had by which he was found indebted to defendants in a certain sum, besides his one-third of whatever loss might be suffered by the non-payment of paper taken from purchasers of the mules. Afterwards a draft of one of these purchasers having gone to protest plaintiff undertook its collection and did collect the money, but refused to pay any of it to defendants, on the ground that they had fraudulently invoiced mules to him at a larger price than had been paid by them, and that they had sold some mule sheds remaining on hand at the close of the adventure, at a price much below the value. Defendants consulted counsel and instituted a criminal proceeding against plaintiff in the Court of Criminal Correction, but plaintiff was discharged by the judge. Subsequently two indictments against plaintiff were successively found by the grand jury upon the same charge. After both indictments had been found the court quashed one and the plaintiff was tried upon the other and acquitted. He then brought this suit against defendants and filed a declaration containing a count on the prosecution in the Court of Criminal Correction and one on each of the indictments. The case was tried and resulted in a verdict and judgment for plaintiff which was reversed on appeal. See 59 Mo.

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557, where the facts are fully reported. On the second trial the court gave a number of instructions, all of which are sufficiently stated in the opinion except the eighth instruction asked for by plaintiff, which was as follows :

“Even if the jury should find that the defendants, prior to such prosecutions, communicated to couns I learned in the law all the facts, yet, nevertheless, if they should further find that such prosecutions were without probable cause and that such counsel were not consulted by them in good faith, but that defendants were actuated in consulting such counsel and in commencing such prosecutions with angry passions and a hostile desire to injure and wrong him, then the opinion and advice of such counsel is of no avail as a defence in the cause.”

The court also instructed the jury that there might be a recovery on each count of the declaration, notwithstanding that all the proceedings were for the same alleged offence.

The verdict and judgment was for plaintiff, and defendant appealed to the Court of Appeals, which reversed the judgment, whereupon plaintiff appealed to this court.

Martin & Lackland, for appellants.

Henderson & Shields, for respondents.

The opinion of the court was delivered by

HOUGH, J.—This was an action for malicious prosecution, and is the same case reported in 59 Mo. 557, where the facts are fully stated, and it will be unnecessary to establish them in this opinion. It will be proper to observe, however, that in the trial which took place after the case was remanded by this court, the plaintiff recovered judgment for \$1500 on the first count, \$3000 on the second count and \$3000 on the third count; whereas, in the first trial, the plaintiff recovered judgment for \$6334.42 on the first count, and judgment was rendered for the defendants on the second and third counts. The first count was founded upon plaintiff's discharge by the committing magistrate, and the second and third counts were founded upon proceedings had upon two indictments found in the criminal court.

It is essential to a recovery in an action for malicious prosecution, that the prosecution should be ended, and that it should have been instituted maliciously and without probable cause.

When this case was here before, this court said: "If there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable. The proof of malice does not establish the want of probable cause, nor does the want of probable cause necessarily establish the existence of malice. That is to say, malice is not an inference of law from the want of probable cause. Malice, however, need not be proved by direct and positive testimony, but may be inferred from the facts, which go to establish the want of probable cause, and this is all that is meant when it is said that malice may be inferred from the want of probable cause:" 59 Mo. 575-6.

In the case of *Van Sickle v. Brown*, 68 Mo. 627, probable cause was defined as follows: "In our opinion, that reasonable and probable cause which will relieve a prosecutor from liability is, a belief by him in the guilt of the accused, based upon circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man:" 68 Mo. 635.

It may be further observed that the action of a grand jury in finding a bill of indictment, or the commitment of the prisoner by the examining magistrate, is *prima facie* evidence of probable cause: *Sharp v. Johnstone*, 59 Mo. 558; *Van Sickle v. Brown*, *supra*; *State v. Railey*, 35 Mo. 168; *Brant v. Higgins*, 10 Id. 728; *Graham v. Noble*, 13 Serg. 233; *Bacon v. Town*, 4 Cush. 217.

On the other hand the refusal of the committing magistrate to bind the defendant over, has been said by this court to be very persuasive evidence that the prosecution was without probable cause: *Sharp v. Johnstone*, *supra*; *Caperson v. Sproule*, 39 Mo. 39; *Brant v. Higgins*, 10 Id. 728.

When an indictment has been found by the grand jury, or the defendant has been committed by the examining magistrate, this *prima facie* evidence of probable cause may be rebutted, or overthrown by evidence showing that such indictment, or commitment, was obtained by false or fraudulent testimony, or other improper means, or by evidence showing that the prosecutor, notwithstanding the action of the grand jury or the committing magistrate, did not himself believe the defendant to be guilty.

When the examining magistrate refuses to commit, and it is thus determined that there is no probable cause for the prosecution, any inference of malice which may be drawn from such fact, will

be overcome by showing that the prosecutor, having fully informed himself as to all ascertainable facts bearing upon the guilt or innocence of the plaintiff, and having fully and fairly communicated the same to reputable counsel, instituted the prosecution under the opinion of such counsel, that the plaintiff was legally subject to a criminal charge, and himself believed such advice to be correct and that the plaintiff was guilty. This is what is meant by consulting counsel and instituting the prosecution in good faith.

Before proceeding to examine, in the light of these general principles, the instructions given and refused by the trial court, the verdict in the case as now presented renders it necessary for us to determine whether there could, in any event, be a recovery on each count of the petition, it being conceded that the two indictments were for the same offence charged before the committing magistrate.

In the case of *Bacon v. Towne et al.*, 4 Cush. 217, it appeared that the plaintiff was bound over by the committing magistrate, and was subsequently indicted by the grand jury, but in consequence of a defect in the indictment the public prosecutor entered a *nolle prosequi* thereon, and forthwith another indictment was laid before the grand jury and was found upon the evidence already given; upon which last indictment the plaintiff was tried and acquitted, and he thereupon instituted an action for malicious prosecution. SHAW, C. J., delivered the opinion of the court, holding that there was a single continuous prosecution which was not ended until the plaintiff was acquitted on the second indictment. The case at bar is distinguishable from that case in this: In the case at bar the first prosecution was ended when the plaintiff was discharged by the examining magistrate. When the prisoner is discharged by the examining magistrate, the law does not require that the examination taken by him shall be certified and delivered to the clerk of the court having cognisance of the offence charged, to be laid before the grand jury. It is only when the prisoner is bound over that this is required to be done: ch. 111, art. 2, §§ 25, 27, 33, W. S. So that if the prosecutor should, after the discharge of the prisoner, voluntarily appear, or cause himself to be summoned, before the grand jury and procure the prisoner to be indicted for the same offence charged before the magistrate, this would be the institution of a second and independent prosecution for which he could be held liable, if he acted maliciously and without probable cause. But if, in such case, the prosecutor should not

voluntarily appear, but should be summoned before the grand jury without his own procurement, he would not be liable to an action, unless the testimony given by him, on which the plaintiff was indicted and arrested was false or fraudulent. And we are further of opinion that when two indictments are found by the grand jury for the same offence, and the second indictment is preferred solely on account of some formal defect in the first, and the first is thereby suspended and is quashed, no action for malicious prosecution can be based upon the order of the court discharging the prisoner from the first indictment. Even if the first indictment had been quashed before the second indictment was found, and the criminal court had committed or recognised the plaintiff to answer a new indictment, as it might have done (sect. 1986, Rev. Stat.), such second indictment could not be regarded as the institution of a new prosecution, but as a continuation of the proceedings under the first indictment. The third instruction asked by the defendants was as follows:

If the jury believe there was reasonable cause for the prosecution, no malice, however distinctly proved, will make defendants liable in this action, and the proof of want of probable cause does not necessarily establish the existence of malice; that is to say, malice is not an inference of law from the want of probable cause, *and the jury cannot infer malice unless the facts attending the conduct and determination of the prosecutions, and those adduced to establish the want of probable cause, are of a character to warrant such inference.*

This instruction is in the language of the opinion delivered by this court, when the case was first here. It was given by the court, with the exception of that portion in italics, and that was properly omitted, as the context of the opinion from which it was taken shows that it was intended by this court as a direction to trial courts in giving instructions in regard to the inference of malice from the want of probable cause. It should not be embodied in an instruction for the reason that it involves a question of law. Whether the facts are such as to warrant an inference of malice, is a question of law for the court. We see no material error in the instructions given by the court, so far as the first count is concerned. Under the view we take of the case additional instructions should have been given applicable to the counts based upon the prosecutions under the indictments.

Instruction number eight given for the plaintiff has been sharply

criticised by the defendant's counsel, and has been declared to be erroneous by the court of appeals. We have the same opinion, however, in regard to this instruction, now, which we had when this case was first here, and treating it as applicable alone to the first count, as it was treated on the record then before us, we think it correct.

The advice of counsel cannot accurately be said to amount to probable cause, in the face of the judgment of the magistrate discharging the prisoner.

The discharge of the plaintiff by the committing magistrate was *prima facie* evidence of a want of probable cause, although counsel may have advised that plaintiff was liable to a criminal charge; and although the defendants may have communicated to counsel learned in the law, all the facts and circumstances bearing upon the guilt or innocence of the plaintiff, which they knew, or by reasonable diligence could have ascertained, yet if, notwithstanding the advice of counsel, they believed that the prosecution must fail, and they were actuated in commencing said prosecution, not simply by angry passions or hostile feelings, but by a desire to *injure and wrong* the plaintiff, then most certainly, they could not be said to have consulted counsel in good faith, and the jury would have been warranted in finding that the prosecution was malicious. This is what we think the 8th instruction means.

The judgment of the Court of Appeals reversing the judgment of the Circuit Court and remanding the case will be affirmed.

All concur except Judge RAY, absent.

The importance to the legal profession of the decision in the principal case lies in its clear and explicit statement of the extent to which, and the real grounds upon which, the advice of counsel will constitute a good defence to an action for malicious prosecution. Concisely stated, the court decides that the advice of counsel will not prevail as an absolute defence, where actual malice is found by the jury. The correctness of the decision rests upon the strength of the position taken by the court, that the advice of counsel given upon a full and complete statement of all the facts within the knowledge of the prosecutor, is a defence only so far as it operates as

a rebuttal of the presumptive malice, which the jury may infer from the proof of want of probable cause, and that it cannot, therefore, establish a conclusive presumption of probable cause.

It is remarkable with what uncertainty the books speak of the manner in which the advice of counsel constitutes a defence. Some of the cases hold that it is proof of probable cause (*Ross v. Innis*, 26 Ill. 259; *Potter v. Seale*, 8 Cal. 217; *Hewlett v. Cruchley*, 5 Taunt. 277; *Levy v. Brannon*, 39 Cal. 485; *Besson v. Southard*, 10 N. Y. 236; *Murray v. McLane*, 2 Car. Law Rep. 186; *Fisher v. Forrester*, 33 Penn. St. 501; *Le Maistre v. Hunter*, Bright. 495;

Olmstead v. Partridge, 16 Gray 383; *Laughlin v. Clawson*, 27 Penn. St. 330). Some maintain that it disproves malice, in most cases imposing no limitation upon its scope (*Snow v. Allen*, 1 Stark. 409; *Murphy v. Larson*, 77 Ill. 172; *Center v. Spring*, 2 Clarke 393; *Sommer v. Wilt*, 4 S. & R. 20; *Stanton v. Hart*, 27 Mich. 539; *Williams v. Van Meter*, 8 Mo. 339; *Davenport v. Lynch*, 6 Jones L. 545; *Rover v. Webster*, 3 Clarke 502), while others, and it is believed the majority of the cases, refer to it as establishing, both the absence of malice and the presence of a probable cause (*Wilkinson v. Arnold*, 11 Ind. 45; *Gould v. Gardner*, 8 La. Ann. 11; *Bliss v. Wyman*, 7 Cal. 257; *Bartlett v. Brown*, 6 R. I. 37; *Walter v. Sample*, 25 Penn. St. 275; *Ames v. Rathbun*, 55 Barb. 194; *Blunt v. Little*, 3 Mason 102; *Phillips v. Bonham*, 16 La. Ann. 387; *Chandler v. McPherson*, 11 Ala. 916; *Turner v. Walker*, 3 G. & J. 380; *Lemay v. Williams*, 32 Ark. 166; *Palmer v. Richardson*, 70 Ill. 545; *Wood v. Weir*, 5 B. Mon. 544; *Wicker v. Hotchkiss*, 62 Ill. 107; *Davie v. Wisher*, 72 Id. 262; *Skidmore v. Bricker*, 77 Id. 164; *Soule v. Winslow*, 66 Me. 447).

Mr. Justice STORY in the case of *Blunt v. Little*, 3 Mason 102, said: "It is certainly going a great way to admit the evidence of any counsel that he advised a suit upon a deliberate examination of the facts, for the purpose of repelling the imputation of malice and establishing probable cause. My opinion, however, is that such evidence is admissible, although it is sometimes open to the objections stated in *Hewlett v. Crutchley*, *supra*."

The Supreme Court of Pennsylvania, in *Walter v. Sample*, 25 Penn. St. 275, expresses itself thus: "Professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of

proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause is the very question submitted to counsel in such cases; and when the client is instructed that they do, he has taken all the precaution demanded of a good citizen." Judge COOLEY, in his work on Torts, p. 183, under the head of malicious prosecutions, says: "It may, perhaps, turn out that the complainant, instead of relying upon his own judgment, has taken the advice of counsel learned in the law, and acted upon that. This should be safer and more reliable than his own judgment, not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearings. A prudent man is, therefore, expected to take such advice, and when he does so, and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause, provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts." And in the principal case, when it was for the first time before the Supreme Court (sec 59 Mo. 577), Judge HUGH said: "The advice of counsel will not amount to probable cause, when the prosecutor resorts to such advice only as a cloak for his malice. He must consult counsel in good faith, and it is not only his duty to make himself acquainted with all ascertainable facts having a bearing upon the supposed offence, but he must communicate all such facts to his counsel, however immaterial he may deem them to be." In an early case, *Sommer v. Wilt*, 4 S. & R. 20, Judge DUNCAN, of the Supreme Court of Pennsylvania, said: "If this act had proceeded from ignorance or mistake of the law on a fair representation of facts to the attorney, I would not impute the honest mis-

take of a professor of the law to malice in the client; for here would be innocence which would strip the case of its malignant qualities, and would, as I rather incline to consider the law, be a defence in the action."

These citations suffice to show that the courts apparently have as yet a confused idea of the ground upon which the advice of counsel furnishes a defence to an action for malicious prosecution. If the advice of counsel, when given upon a fair and complete statement of all the facts bearing upon the case that are within the knowledge of the prosecutor proves the existence of probable cause, then it furnishes a complete bar to the action, whatever may have been the motive which induced the proceeding. The most positive and venomous malice will not render the prosecutor liable, if he can establish probable cause for the prosecution.

As is generally stated in all the cases upon this subject, malice and want of probable cause must co-exist to found an action for malicious prosecution. Although the malice need not be directly and affirmatively proved, but may be inferred from the want of probable cause (*Pangburn v. Bull*, 1 Wend. 345; *White v. Tucker*, 16 Ohio St. 468; *Amnerman v. Crosby*, 26 Ind. 451; *Cooper v. Utterbach*, 37 Md. 282; *Blass v. Gregor*, 15 La. Ann. 421; *McKown v. Hunter*, 30 N. Y. 625; *Willans v. Taylor*, 6 Bing. 183; *Closson v. Staples*, 42 Vt. 209; *Purcell v. McNamara*, 9 East 361; *Mowry v. Whipple*, 8 R. I. 360; *Harpham v. Whitney*, 77 Ill. 32; *Flickinger v. Wagner*, 46 Md. 581; *Merriam v. Mitchell*, 13 Me. 439; *Dietz v. Langfitt*, 63 Penn. St. 234; *Schofield v. Ferrers*, 47 Id. 194; *Paukett v. Livermore*, 5 Clarke 277; *Garrison v. Pearce*, 4 E. D. Smith 255; *Cecil v. Clarke*, 17 Md. 508; *Harkrader v. Moore*, 44 Cal. 144; *Holliday v. Sterling*, 62 Mo. 321; *Savil v. Roberts*, 1 Salk. 14, 15; *Ewing v. Sanford*, 19

Ala. 605); the want of probable cause cannot be inferred, but must be proven affirmatively and independently of the presence of actual malice: *Travis v. Smith*, 1 Penn. St. 234; *Willans v. Taylor*, 6 Bing. 183, 186; *Mitchinson Cross*, 58 Ill. 366; *Malone v. Murphy*, 2 Kans. 250; *Hall v. Hawkins*, 5 Humph. 357; *Cloon v. Gerry*, 13 Gray 201; *Israel v. Brooks*, 23 Ill. 575; *Flickinger v. Wagner*, 46 Md. 581; *Wade v. Walden*, 23 Ill. 425; *Chapman v. Caurey*, 50 Id. 512; *Sappington v. Watson*, 50 Mo. 83; *Callahan v. Cafarata*, 39 Id. 136; *Casperson v. Sproule*, 39 Id. 39; *Foshay v. Ferguson*, 2 Denio 617; *Heyne v. Blair*, 62 N. Y. 19, 22; *Hurd v. Shaw*, 20 Ill. 354; *Bell v. Pearcey*, 5 Ired. 83; *Center v. Spring*, 2 Clarke 393; *Kidder v. Parkhurst*, 3 Allen 393; *Krug v. Ward*, 77 Ill. 603; *Skidmore v. Bricker*, 77 Id. 164.

Probable cause, as defined by the Supreme Court of the United States, is "the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime, for which he was prosecuted:" *Wheeler v. Newbitt*, 24 How. (U. S.) 545. See, also, *Broad v. Hum*, 5 Bing. (N. C.) 722; *Faris v. Starke*, 3 B. Mon. 4; *Farnam v. Feeley*, 56 N. Y. 451; *Barron v. Mason*, 31 Vt. 189; *Fagnan v. Knox*, 66 N. Y. 525; *Shaul v. Brown*, 28 Iowa 37; s. c. 4 Am. Rep. 151; *Braveboy v. Cockfield*, 2 McM. 270; *Winebiddle v. Porterfield*, 9 Penn. St. 137; *Gallaway v. Burr*, 32 Mich. 332; *Bacon v. Towne*, 4 Cush. 217; *Collins v. Hayte*, 50 Ill. 353; *Gee v. Patterson*, 63 Me. 49; *Lawrence v. Lanning*, 4 Ind. 194; *Carl v. Ayers*, 53 N. Y. 14; *Spengler v. Davy*, 15 Grat. 381; *Mowry v. Whipple*, 8 R. I. 360; *Bauer v. Clay*, 8 Kans. 580; *Boyd v. Cross*, 35 Md. 194; *Jacks v. Stimpson*, 13 Ill. 701; *Travis v. Smith*,

1 Penn. St. 234; *Stone v. Stevens*, 12 Conn. 219; *Hall v. Suydam*, 6 Barb. 83; *Raulston v. Jackson*, 1 Sneed 128. Probable cause does not rest upon the sincerity of the prosecutor's belief, nor upon its reasonableness, as shown by facts which are calculated to influence his judgment, peculiarly, and not the judgment of others. It must be established by facts, which are likely to induce any reasonable man to believe that the person is guilty of the alleged crime. It is not affected by the individual belief or unbelief of the prosecutor. Although his honest belief in the guilt of the accused is necessary to shield him from a judgment for malicious prosecution, it is not because such belief is necessary to establish probable cause, but because its absence proves that the prosecution was instituted for the gratification of his malicious feelings towards the accused. The definition cited in the principal case with approval from *Van Sickle v. Brown*, 68 Mo. 627, that "that reasonable and probable cause, which will relieve a prosecutor from liability, is a belief by him in the guilt of the accused, based upon circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man," is a loose and unguarded statement of what constitutes "probable cause," and is calculated to mislead in the settlement of the effect of professional advice upon the establishment of probable cause. Perhaps to this very misapprehension of the meaning of "probable cause" may be traced the common error as to the manner in which the advice of counsel affords a defence, and which the principal case undertakes to correct. If probable cause depends upon the honest reasonable belief of the prosecutor in the guilt of the accused, it is certainly based upon reasonable grounds, if his legal adviser tells him he has a good cause of action. He has a right to presume that an attorney, an officer of the court, is skilled in the law, and is better able to

judge of the probability of the cause than he. But his belief does not enter into the determination of the question of probable cause. It is not established when it is shown that the facts and circumstances of the case were sufficient to make the prosecutor's belief reasonable; it must be shown that as a matter of law they were sufficient to induce in any reasonably prudent man the belief, that a good cause of action exists. If that be the true definition, and it is fully established by the cases cited *supra*, the advice of counsel certainly cannot furnish a conclusive presumption of probable cause. His opinion cannot be binding upon the court, nor is it such a fact, standing alone, which would induce any reasonably prudent man to believe in the commission of the offence. The faith and confidence reposed by the prosecutor in the counsel, might make it reasonable for him to believe in the existence of probable cause, but it is not a fact which would be capable of supplanting the judgment of the court; although such an opinion, given by able and learned counsel in a case of doubtful circumstances, would be entitled to its proper weight as argument. As Mr. Justice STORY says: "What constitutes a probable cause of action is, when the facts are given, matter of law upon which the court is to decide; and it cannot be proper to introduce certificates of counsel to establish what the law is:" *Blunt v. Little*, 3 Mason 102. Probable cause is a question of law to be determined by the court upon the facts of the case: *Israel v. Brooks*, 23 Ill. 575; *Garrison v. Pearce*, 4 E. D. Smith 255; *Greenwade v. Mills*, 31 Miss. 464; *Busst v. Gibbons*, 6 H. & N. 912; *Ulmer v. Leland*, 1 Mc. 135; *Cloon v. Gerry*, 13 Gray 201; *Boyd v. Cross*, 35 Md. 194; *Wade v. Walden*, 23 Ill. 425; *Masten v. Deyo*, 2 Wend. 424; *McWilliams v. Hoban*, 42 Md. 56; *Center v. Spring*, 2 Clarke 393; *Chapman v. Cauvrey*, 50 Ill. 512; *Pangburn v. Bull*, 1 Wend. 345; *Sweet*

v. Negus, 30 Mich. 406; *Besson v. Southard*, 10 N. Y. 236; *Waldheim v. Sichel*, 1 Hilton 45; *Cooper v. Waldron*, 50 Me. 80; *Speck v. Judson*, 63 Id. 207; *Kidder v. Parkhurst*, 3 Allen 393; *Thompson v. Force*, 65 Ill. 370; *Harkrader v. Moore*, 44 Cal. 144; *Swain v. Stafford*, 4 Ired. 392. But if the facts are in dispute, so that the question of probable cause becomes a mixed one of law and fact, it must be given to the jury to determine upon proper instructions from the court: *Garrison v. Pearce*, 3 E. D. Smith 255; *Humphries v. Parker*, 52 Me. 502; *Ulmer v. Leland*, 1 Me. 135; *Greenwade v. Mills*, 31 Miss. 464; *Heyne v. Blair*, 62 N. Y. 19; *Besson v. Southard*, 10 N. Y. 236; *Waldheim v. Sichel*, 1 Hilton 45; *Cole v. Curtis*, 16 Minn. 182; *Driggs v. Burton*, 44 Vt. 124; *Sims v. McLendon*, 3 Strobb. 557.

The advice of counsel, therefore, is only so far a good defence, as it tends to prove the honesty of the prosecutor's belief in the guilt of the accused. And the honesty of his belief only has weight as evidence of the purity and legality of his motives in commencing the prosecution. If the want of probable cause is shown, it is a rule of law that the jury may infer malice from the groundlessness of the cause, and are not obliged to find actual malice in order to bring in a verdict of guilty: *Mitchell v. Jenkins*, 5 B. & A. 588; *Burhaus v. Sanford*, 19 Wend. 417; *Munns v. Dupont*, 3 Wash. C. C. 31; *Nicholson v. Coghill*, 4 B. & C. 21; *Harpham v. Whitney*, 77 Ill. 32; *Green v. Cochran*, 43 Iowa 544; *Center v. Spring*, 2 Clarke 393; *Barron v. Mason*, 31 Vt. 189; *Page v. Cushing*, 38 Me. 523. The jury may presume that the institution of a prosecution without probable cause, proceeded from malice and a desire to injure the accused. But it is not a conclusive presumption. It is possible to rebut it by the proof of any facts which tend to show that the prosecutor was actuated solely by the laudable motive of bringing

a criminal to justice: *Wheeler v. Nesbitt*, 24 How. (U. S.) 544; *Barron v. Mason*, 31 Vt. 189; *Scanlan v. Cowley*, 2 Hilton 489; *Center v. Spring*, 2 Clarke 393; *Besson v. Southard*, 10 N. Y. 236; *Hayes v. Hayman*, 20 La. Ann. 336; *Lyon v. Hancock*, 35 Cal. 372; *Blass v. Gregor*, 15 La. Ann. 421. Such a fact is the advice of counsel that there exists a good cause of action. "Every man of common information is presumed to know that it is not safe in matters of importance, to trust to the legal opinions of any but recognised lawyers; and no matter is of more legal importance than private reputation and liberty. When a person resorts to the best means in his power for information, it will be such a proof of honesty as will disprove malice and operate as a defence proportionate to his diligence." Judge CAMPBELL's opinion in *Stanton v. Hart*, 27 Mich. 539. It is only, however, as evidence of his good motives, in rebuttal to the inference of malice from the want of probable cause, that it will prevail as a defence. It does not constitute a conclusive presumption of good faith on the part of the prosecutor. If, therefore, there are facts, as in the principal case, which establish the existence of malice and show that the procurement of professional opinion was to cloak his malice, or, as a matter of precaution, to learn whether it was safe to commence proceedings, the defence will not prevail: *Glascock v. Bridges*, 15 La. Ann. 672; *Chapman v. Dodd*, 10 Minn. 350; *Burnap v. Albert*, Tancy 344; *Ames v. Rathbun*, 55 Barb. 194; *Rover v. Webster*, 3 Clarke 502; *Davenport v. Lynch*, 6 Jones L. 545; *Fisher v. Forrester*, 33 Penn. St. 501; *Kimball v. Bates*, 50 Me. 308; *Brown v. Randall*, 36 Conn. 56; *Prough v. Entriiken*, 11 Penn. St. 81; *Schmidt v. Weidman*, 63 Id. 173; *Krug v. Ward*, 77 Ill. 603. In *Snow v. Allen*, 1 Stark. 409, one of the earliest cases in which the advice of counsel was set up as a defence, Lord ELLEN-

BOROUGH inquired: "How can it be contended here that the defendant acted maliciously? He acted ignorantly."

* * * "He was acting under what he thought was good advice; it was unfortunate that his attorney was misled by *Higgen's Case*, Cro. Jac. 320; but unless you can show that the defendant was actuated by some purposed malice, the plaintiff cannot recover."

In order that the advice of counsel may furnish a counter-presumption to the inference of malice from the want of probable cause, several requirements must have been satisfied. In the first place, the opinion must have been given after a full and complete statement of all the facts within the knowledge of the prosecutor, which bear upon the guilt or innocence of the accused. Says Mr. Justice STORY: "It appears to me that a necessary qualification of the admission is, that it should appear in proof that the opinion of counsel is fairly asked upon the real facts and not upon statements which conceal the truth or misrepresent the cause of action. If the law were otherwise, nothing would be more easy than to shelter the most malicious prosecutions under the opinion of counsel, honestly given, but under a total mistake of the facts. Probable cause of action in the opinion of counsel must depend upon the facts which are brought before him; and if the whole facts which are material to form such opinion are not presented to the mind, how can the court say that he has given any opinion as to the true cause of action?" *Blunt v. Little*, 3 Mason 102. See also, *Chandler v. McPherson*, 11 Ala. 916; *Sharp v. Johnston*, 59 Mo. 557; *Ross v. Innis*, 35 Ill. 487; *Aldridge v. Churchill*, 28 Ind. 62; *Turner v. Walker*, 3 G. & J. 380; *Walter v. Sample*, 25 Penn. St. 275; *Skidmore v. Bricker*, 77 Ill. 164; *Potter v. Seale*, 8 Cal. 217; *Lemay v. Williams*, 32 Ark. 166; *Phillips v. Bonham*, 16 La. Ann. 337; *Wicker v. Hotchkiss*, 62 Ill. 107;

Wood v. Weir, 5 B. Mon. 544; *Hill v. Puhn*, 38 Mo. 13; *Fisher v. Forrester*, 53 Penn. St. 501; *Soule v. Winslow*, 66 Me. 447; *Cooper v. Utterbach*, 37 Md. 282; *Hall v. Suydam*, 6 Barb. 83; *Thompson v. Lunley*, 50 How. Pr. 105.

In the ascertainment and presentation to counsel of the facts of the case, the prosecutor is required to exercise the utmost diligence. And if there were facts undiscovered, which by due care could have been ascertained, or not disclosed to counsel because the prosecutor did not deem them material, it would have the same effect upon the value of the legal opinion as if they had been corruptly and wilfully concealed: *Sappington v. Watson*, 50 Mo. 83; *Lery v. Brannan*, 39 Cal. 485; *Stevens v. Fussett*, 27 Me. 266; *Hill v. Puhn*, 38 Mo. 13; *Sharp v. Johnston*, 59 Id. 557; *Hewlett v. Cruchley*, 5 Taunt. 277; *Bliss v. Wyman*, 7 Cal. 257; *Thompson v. Mussey*, 3 Greenl. 305; *Scotten v. Longfellow*, 40 Ind. 25; *Galloway v. Stewart*, 49 Id. 156.

It must be shown that the person upon whose opinion the defendant relied was a regular, practising attorney at law. "To permit the counsel of those whose capacity we have no means of judging, and who owe no responsibility to the courts, to be received as evidence, would lead to collusion and furnish a ready defence in all actions like the present:" *Williams v. Van Meter*, 8 Mo. 339. The real ground for this limitation of the doctrine is that by seeking the counsel of others than attorneys duly authorized to practice law, the prosecutor has not exercised that care and precaution which is required of him before endangering the reputation and liberty of a citizen. "The persons, to consult whom is the duty of a party, who conceives himself aggrieved and is about to institute a criminal prosecution, are gentlemen of the legal profession and not those who, in point of qualification to advise upon such questions, stand no higher

than that party himself." Mr. Justice STORY, in *Blunt v. Little*, *supra*. See also, *Olmstead v. Purtridge*, 16 Gray 381; *Murphy v. Larson*, 77 Ill. 172; *Stanton v. Hart*, 27 Mich. 539; *Beal v. Robeson*, 8 Ired. 276; *Burgett v. Burgett*, 43 Ind. 78; *Straus v. Young*, 36 Md. 246. Justices of the peace and all other persons who are not regularly admitted to the bar as attorneys and counsellors, are generally held to be incompetent advisers for the purpose of affording protection against the action for such malicious prosecution: *Sutton v. McConnell*, 46 Wis. 269; *Olmstead v. Purtridge*, 16 Gray 381; *Murphy v. Larson*, 77 Ill. 172, and cases cited in the preceding note. But in Philadelphia it has been held that a city alderman, as the conservator or justice of the peace, is capable of advising parties in such cases, and such advice will afford a defence to the imputation of malice: *Thomas v. Painter*, 10 Phila. 409; *Rosenstein v. Feigel*, 6 Phila. 532. This has not yet been passed upon by the Supreme Court of Pennsylvania: *Bernar v. Dunlap*, 13 Norris 329.

It has also been held in a late case in the Supreme Court of Maine, *White v. Carr*, 71 Me. 558, that the opinion of counsel will not avail as a defence if the counsel is jointly interested with the prosecutor in the prosecution. This seems to be a very proper limitation. For it has been repeatedly held, that if counsel expresses doubt as to the existence of probable cause, or acts in bad faith in collusion with the client, the advice will be no defence: *Kendrick v. Cypert*, 10 Humph. 291; *Stone v. Swift*, 4 Pick. 389; *Cole v. Curtis*, 16 Minn. 182; *Center v. Spring*, 2 Clarke 393.

If the attorney is interested in the conviction of the alleged criminal, he certainly is not competent to give an unbiased opinion upon the question of probable cause. His judgment is very likely to be swayed by personal interest. If, however, the prosecutor is ignorant of the fact, it will not affect the honesty of the prosecutor's belief or his good faith more than any other improper motive of counsel, if not shared in by the client: *Burnap v. Albert*, Taney 244.

Finally, the defendant must have acted in good faith upon the advice received. He must not only believe that he has a good cause of action when he commences the proceedings (*Ravenga v. Macintosh*, 2 B. & C. 693; *Thompson v. Lumley*, 50 How. Pr. 108; *Potter v. Seale*, 8 Cal. 217; *Hall v. Suydam*, 6 Barb. 83; *Anderson v. Friend*, 71 Ill. 475), but he must continue to do so throughout the entire course of the proceedings. If, subsequently, facts are discovered which throw new light upon the case, or he obtains a contrary opinion from some other attorney, either of which being sufficient to induce a reasonably prudent man to doubt the justice of his cause, the prosecutor is not permitted to rely any further upon the counsel's opinion. It will protect him as to all steps taken in the prosecution before the discovery of the new facts; but he must discontinue the proceedings or communicate them to the counsel; and if counsel still advises him that he has a good cause, he may proceed in the prosecution, and such subsequent advice will protect him: *Stone v. Swift*, 4 Pick. 389; *Cole v. Curtis*, 16 Minn. 182; *Center v. Spring*, 2 Clarke 393; *Ash v. Marlow*, 20 Ohio St. 119.

C. G. TIEDMAN.

Columbia, Mo.

Supreme Court of Illinois.

MADELAINE ROTH v. FREDERICK EHMAN ET AL.

The courts of a state in which a marriage valid by its laws is contracted between subjects of foreign states, will give effect to a subsequent decree of the court of the foreign state of which the husband was a subject, annulling the marriage on the ground that it had been contracted without the consent of the sovereign of such foreign state, it appearing that at the time of the decree of nullity both parties had returned to such foreign state and were within the jurisdiction of the court pronouncing the decree.

R., a subject of the Kingdom of Wurtemberg, came to Illinois and there married without first obtaining the permission of the king of Wurtemberg. A statute of Wurtemberg declared that all marriages of its subjects without such precedent royal consent should be null and void, whether celebrated at home or abroad. R. returned with his wife to Wurtemberg, and in a suit, in which both parties appeared, a court there entered a decree annulling the marriage for want of such consent. Subsequently R. married a second wife, and died. In a suit to determine the right of the first wife to dower in property in Illinois: *Held*, that although the marriage in Illinois was valid, the decree of the court of Wurtemberg annulling it must be accepted as having destroyed the marital status resulting from that marriage, and that the first wife therefore had no right of dower.

APPEAL from a decree of the Superior Court of Cook county, dismissing a bill filed to obtain partition of an estate. The facts were as follows:

John George Roth, a subject of the Kingdom of Wurtemberg, came to this country and settled in Chicago at an early day, and there accumulated a large amount of property, consisting chiefly of real estate, which is the subject of controversy in this suit. In 1855 he married, in Chicago, Madelaine Moser, a native and subject of France. In 1856 they returned to Europe, and on their arrival in that country, or shortly afterwards, a separation took place between them, resulting in her returning to reside with her father in Alsace, France, her former domicile and residence, and in his establishing a new residence in Schorndorf, in the Kingdom of Wurtemberg, where he continued to reside until the time of his death, on July 12th 1876. In 1862 his wife returned to this country and instituted proceedings for a divorce. She was shortly afterwards followed by her husband, and through his influence induced to abandon the divorce suit and return with him to Schorndorf, where they again resumed marital relations, which were continued until October 1870, when he commenced legal proceedings in the proper court at their domicile in Wurtemberg, to procure a decree of nullity of their marriage on the ground

that it had been entered into on his part in violation of the laws of the Kingdom of Wurtemberg, of which he was at that time a subject. On the 24th of April, 1873, the cause was brought to a final hearing, both parties being present and represented by their respective counsel, resulting in a decree declaring the marriage a nullity on the ground just stated. The court in which the decree was rendered had jurisdiction both of the parties and the subject-matter of the suit, and under the laws of Wurtemberg had full power and competent authority to enter the decree. On the 9th of September following, in consideration of \$8000 in U. S. bonds paid to her by Roth, Madelaine, his former wife, released to him all her interests, whatever they might be, in the property in controversy. On the 27th of November following, Roth contracted a second marriage with Amelia Staehle, who now claims the estate in controversy. After the marriage of Amelia and Roth, on the 28th of March 1874, they entered into an agreement known to the laws of Wurtemberg as a "marriage and inheritance contract," by which it was provided they were to hold the property belonging to them respectively during their joint lives as common property, with the right of survivorship to the longer liver, subject to the payment of their debts, the education and marriage portion of their children, and to the payment by her in the event she survived him, of certain legacies to his relations, amounting altogether to 80,000 florins, which contract was duly approved and confirmed by the proper court of that country. Immediately before his death, and with a view of enabling his wife to carry out the contract just mentioned, Roth conveyed, or attempted to convey the property in controversy to her brother, Albert Staehle, but whatever interest passed by it was subsequently re-conveyed by him to Amelia. After Roth's death, on the 25th of September 1876, Madelaine visited Schorndorf, and while there spent much of her time with Amelia, and accepted of her various presents, etc. On the 26th of the same month Madelaine in consideration of ten thousand marks, released to Amelia all claims to and upon her late husband's estate, and on the 3d of October following, executed to her a deed to the property in controversy; Roth at the time of his death left no child or children, or descendants thereof. Under these circumstances, in 1878, the present bill was filed by Madelaine in the Superior Court of Cook county against Amelia and the heirs at law of Roth, in and by which she

claims that the marriage between her and Roth was a legal and valid marriage; that the decree of the Wurtemberg court and all the proceedings upon which it is based were and are null and void, and that she is, therefore, the lawful widow and heir of her said husband, and as such entitled to a partition and division of his estate under the statute. Amelia answered the bill, and also filed a cross-bill setting up the facts above recited, and relying on them to establish her rights as the survivor and lawful widow of Roth, to the property in dispute. A cross-bill was also filed by the heirs of Roth, setting up their rights in the premises. The court found the equities with Amelia upon her cross-bill, and entered a decree dismissing the original bill, and directing the heirs of Roth to be paid the amount due them under the "marriage and inheritance contract." The decree was performed as to the heirs of Roth, and Madelaine Roth alone brought the case by appeal to this court for review.

Harris, for appellant.

Rosenthal & Pence, for appellee.

The opinion of the court was delivered by

MULKEY, J.—In the view we take of this case, we do not deem it necessary to follow counsel in the wide range their exhaustive and elaborate arguments have taken; but shall confine ourselves to one or two of the topics discussed in the briefs, which we regard as conclusive of the controversy, whatever may be our views with respect to the other issues in the case.

So far as the marriage between him and Madelaine Moser is concerned, we have no hesitancy in saying that for all purposes in this State, it was a legal and valid marriage, notwithstanding Roth, at the time, was a subject of the Kingdom of Wurtemberg, and had not obtained a license authorizing such marriage, from the sovereign of that kingdom, as required by the laws thereof. As both of the parties were domiciled here at the time of its celebration, it is not important to determine whether the validity of a marriage depends upon the *lex domicilii* or the *lex loci contractus*; for whatever the conclusion which might be reached upon that question, the result would be the same so far as this case is concerned, both laws being identical; if the marriage was in conformity with either, it must necessarily have been with the other also, and as it seems

to have been solemnized in strict conformity with our statute regulating the subject, and as the parties were manifestly competent under our own laws to contract the relation, it follows, as before stated, the marriage was valid and binding.

While this marriage was clearly valid here for all purposes whatsoever, it does not follow that upon the return of the parties to the country of their nativity, and of which they were still subjects, it would or ought to be held equally valid there; for it is clearly settled by the decided weight of private international law, so called, that every State has the power to enact laws which will personally bind its citizens or subjects when sojourning in a foreign jurisdiction, provided such laws in terms profess to so bind them when thus circumstanced. It is true such laws have no extra-territorial effect so as to authorize their enforcement in a foreign country, and may therefore, so far as their execution is concerned, be said to remain dormant till the return of those violating them, when they will be enforced in the same manner and to the same extent as if their infraction had occurred within the State enacting them.

Nor does it follow that the *status* or relation created by the marriage could only be annulled by our own courts, or that it could only be annulled by other courts for such causes as would be recognised as sufficient for that purpose under our own laws. When the parties returned to Wurtemberg and acquired a new domicile there, so far as their personal rights and relations are concerned, our laws and government ceased to have any power over them, or concern with them. Personally the State had no claims on them and they owed it no allegiance or duty.

Whether the Kingdom of Wurtemberg on their return and acquiring a new domicile there, would recognise the *status* or relation which they had contracted here, depended upon its own laws, and not upon ours. That kingdom, in 1808, adopted an ordinance or law which was in full force at the time of the marriage in Chicago, declaring all such marriages in a foreign state, without the license of the sovereign, absolutely null and void. It was, therefore, according to the general current of authority on the subject, entirely competent for the courts of that kingdom having jurisdiction of such matters, to give effect to that law by annulling and setting aside the marriage upon a proper application for that purpose, which was done in this case.

Ordinarily where a party upon a change of domicile goes into

another state or country, the personal *status* which he carries with him will be recognised by the courts of the latter country.

This is certainly the general rule, but it is subject to certain well-recognised exceptions. If, for instance, such *status* has been acquired, as in the present case, by a violation of express provisions of the positive law of the state in which its recognition is asked, or if it be contrary to the genius and spirit of its institutions, as a title of nobility would be here, or if it is opposed to its settled policy, or to the good order and well-being of society, or to public morality and decency, in all such cases the *status* would not and should not be recognised by the courts of the latter state. Assuming the compromises of appellant with Amelia and Roth respectively, relating to her interest in the latter's estate, were made by her in ignorance of her rights, and that they were effected through the fraud and misrepresentation of them and others acting in concert with them, as is claimed by her, of which we express no opinion, at least for the present, it follows that the result of this case must depend chiefly upon the legal effect which must, under the circumstances stated, be given by the courts of this state to the decree rendered by the Wurtemberg court annulling the marriage, and this we regard as the vital question in the case. The general rule unquestionably is, where it affirmatively appears that the court of a foreign state has jurisdiction of the parties and subject-matter of the suit, its judgment or decree will be conclusive on the parties, their legal representatives and privies, in all countries where the matters litigated are again drawn in question, and this is particularly true with respect to judgments or decrees affecting the *status* of a person; for they are in the nature of judgments *in rem*, which are binding on the whole world. Wharton's Conflict of Laws, sections 800-2, 815-17, 822-23; Bigelow on Estoppel 170-178; Freeman on Judgments, sec. 528.

The above rule is also fully recognised by this court. *Baker v. Palmer*, 83 Ill. 568. The limitation to this rule is that it may be shown that such judgment or decree was obtained by means of fraud or some gross abuse of the process of the court or flagrant departure from the ordinary course of judicial procedure, as for instance, that a party in interest sat as a judge in the cause.

While it is claimed by counsel for appellant, in general terms, that the court rendering the decree in question acted without jurisdiction, and that the same was obtained by fraud, yet we fail to

discover anything in the record to warrant either of these charges.

It is not sufficient, as it has often been held by this court, for the purpose of successfully assailing a transaction on the ground of fraud, to charge fraud generally; but the complaining party must state in his pleading and prove on the trial, specific acts or facts relied on as establishing fraud. That has not been done in this case; so far as we are able to discover, the trial was perfectly regular, and conducted with the utmost fairness, and we see no ground to question the jurisdiction of the court. The depositions of persons learned in the law of that country have been taken in this case, and they clearly show the several courts through which that case passed during its pendency, were by the laws of that country the proper tribunals to take cognisance of cases of that character in the manner it was done; and it is further shown that both parties appeared in the cause by themselves and counsel; hence, as before stated, we see no ground for questioning the jurisdiction of those tribunals.

We are of opinion, therefore, the decree of nullity must be given in the courts here the same effect which would be given to it by the courts of the country in which it was rendered. The effect of the decree there, as we understand it, was not merely to establish conclusively the nullity of the contract of marriage, or of the marriage itself, but also to annul and terminate the *status* or marital relations of the parties, which arises from a *de facto* as well as a *de jure* marriage, so as to leave them in precisely the same condition as if no marriage had ever taken place between them. This being the effect of the decree there, it must be given the same effect here.

Such, then, being the legal operation of the decree, it follows that the appellant was not at the time of Roth's death his wife, either *de facto* or *de jure*, and hence she is not his widow, for no one answers that description who was not his wife at the time of his death, and consequently she has no right, as such, to succeed to his estate.

For the same reasons it follows that the subsequent marriage between Roth and Amelia was lawful and valid, and that relation having continued up to the time of his death, it results that she, and not appellant, is his lawful widow, and as such is entitled to his estate.

It is true the "marriage and inheritance contract" did not, upon his decease, have the effect of clothing her with the legal title to the real estate in controversy as his survivor, as it doubtless would have done had the property been situated in the Kingdom of Wurtemberg, instead of here; for it is not competent for parties here or elsewhere by mere agreement to charge the manner of transferring real property in this state, but the agreement in question upon his decease operated as an equitable assignment of the estate to her, which was properly enforced by the decree in this cause. Having reached the conclusion stated with respect to the decree of nullity, it is therefore unnecessary to discuss the effect of the compromises above alluded to and relied upon as an estoppel by appellee. Whatever our views might be with respect to that matter, we are of opinion the law is with the appellee on the grounds already stated.

Decree affirmed.

SCOTT and WALKER, JJ., dissented.

Many of the governments of Europe impose restraints and prohibitions upon the marriage of their subjects abroad. France, Belgium, the Provinces on the left bank of the Rhine, the Duchy of Burg, the Netherlands, the Grand Duchy of Baden and the two Sicilies require the marriage of their subjects abroad to be publicly contracted, and that the man be twenty-five, and the woman twenty-one years of age. Bavaria and Wurtemberg forbid the marriage of their subjects abroad without the consent of their respective governments. Baden and Switzerland forbid the intermarriage of their citizens without such governmental consent. The same is true of Bavaria and Austria. The latter country, and likewise Saxony, impose upon their subjects the same restrictions as to the marriage of their subjects abroad as France imposes upon French subjects abroad. Prussia nullifies the marriage of its citizens abroad with intent to evade the Prussian laws. Denmark, Norway, Schleswig and Holstein make such marriages voidable. Nassau prohibits its subjects from marrying Jews abroad without the consent

of the home government. Sardinia requires its subjects marrying abroad to do so according to the rites of the Roman Church. England prohibits absolutely the marriage abroad of an Englishman with his deceased wife's sister, and makes the consent of Parliament a prerequisite to the marriage abroad of a member of the royal family. The penalty generally attached to these prohibitions is that the marriage will be null and void, or voidable, even though valid in the place where contracted. Various reasons are relied upon to sustain these enactments—among others, that governmental consent is required in order to prevent male subjects from marrying before they perform the military duty they owe the state; and also as a police regulation to restrain or prevent marriage until the contracting parties shall be able to take care of a family.

Every nation may control the *status* of its citizens, and enforce such control whenever persons or property within its jurisdiction enable it to do so: Westlake Priv. Int. Law 24-80; Story's Conf. Law, sects. 223, 224, 328-30; Whart.

Conf. Law, 2d ed., sects. 132, 205, 211, 219, 223; 1 Bish. M. & D., sects. 367, 369; Guthrie's Savigny Priv. Int. Law 248; 2 Kent 107, note; Hubback on Succ. 335; Bigelow on Estoppel 159, 160; Piggott For. Judg. 167, 168; *Shaw v. Gould*, L. R., 3 H. L. 56, per Lord WESTBURY; *Kinnier v. Kinnier*, 45 N. Y. 535; *Hunt v. Hunt*, 72 Id. 228; *Barber v. Root*, 10 Mass. 260; *Cheever v. Wilson*, 9 Wall. 108; *Strader v. Graham*, 10 How. 82; *Dorsey v. Dorsey*, 7 Watts 349; *Ditson v. Ditson*, 4 R. I. 87; *Udny v. Udny*, L. R., 1 S. Ch. App. 441; *Potter v. Broen*, 5 East 124; *Mette v. Mette*, 1 Sw. & Tr. 416; Dicey 221; *Forbes v. Cochrane*, 2 B. & C. 448.

Marriage is a *status* and every state has the right to formulate and to enforce, as to persons within its jurisdiction, its own marital policy. It may declare who of its subjects may marry, under what conditions and with what ceremonies; and it may make its enactments with reference to these matters ubiquitous—that is, obligatory upon its subjects wherever they go. Their duty to obey follows from their duty of allegiance, but obedience can be compelled only by the action of the state either upon property which its subjects left in its jurisdiction upon going abroad, or upon their persons when they return: 1 Bish. M. & D., sects. 3, 667; Story's Conf. Laws, sects. 228, 229 *a*, 229 *b*, 230 *a*; *Barber v. Root*, 10 Mass. 265; *Strader v. Graham*, 10 How. 82; *Maguire v. Maguire*, 7 Dana 181; *Cheever v. Wilson*, 9 Wall. 108; *Harrison v. Harrison*, 19 Ala. 499; *Harvie v. Furnie*, L. R., 5 P. D. 153; 43 L. T. R. 738; L. R., 6 P. D. 35; 23 Alb. L. J. 329. But no state can reach the persons or property of its subjects abroad, except under some treaty or international contract. No state can, while its subject is abroad, compel him to conform to its marital policy. No government can formulate and enforce its own policy in the country of another government, even as to its own citizens

sojourning there. Take for example the rule that no man shall marry his sister-in-law. This is a part of British marital policy. But the statute formulating the rule is not in force even in Canada: *Ilodyins v. McNeil*, 9 Grant's Ch. (Up. Can.) 309; 9 U. C. L. J. 126. In *Stevenson v. Gray*, 17 B. Monroe 208, MARSHALL, C. J., says: "By a statute of Virginia, the marriage of a man with his deceased wife's sister was declared or deemed to be unlawful, but such a marriage taking place in another state, where it was lawful, would surely not be affected by the penalties or other consequences denounced by this statute if the parties should subsequently remove to the state of Virginia." In *Dannelli v. Dannelli*, 4 Bush 55, a marriage of two Italians so related, contracted in and valid by the laws of Switzerland, was held valid although contrary to the laws of Italy; and Mr. Bishop says (1 M. & D., sect. 320): "Marriage with the deceased wife's sister is, in most of the states, not only not forbidden, but deemed commendable."

Prohibitions by other countries upon their subjects marrying until they have attained certain ages, are not enforced by American courts: Whart. Conf. Laws, sect. 147.

Laws making the precedent consent of parents or of the state essential to a valid marriage, are not of extra territorial obligation: Whart. Conf. Laws, sect. 150.

Neither are laws prohibiting the marriage of ecclesiastics: Whart. Conf. Laws, sect. 154. Nor are prohibitions of marriage with Jews or infidels: Whart. Conf. Laws, sect. 155. Nor are laws prohibiting marriage on account of inequality of rank: Whart. Conf. Laws, sect. 158. Nor are laws prohibiting miscegenetic marriages: Whart. Conf. Laws, sect. 159.

All these statutory prohibitions are in force in the countries that enact them. But they are not of extra territorial

obligation. They can restrain or compel no one in the various United States. American courts do not recognise or enforce them, because they are part of the marital policy of other countries, and are in derogation of a well-established principle of American policy.

Early marriages lessen prostitution and illegitimacy. They hasten the establishment of new homes. They accelerate the occupancy and development of a new and sparsely-settled country. They are promotive of industry, frugality and temperance. They add to the native born population, and for these reasons, it is the policy of the United States to encourage early, easy and lawful marriage. Inducements to marriage, in the shape of homesteads and exemptions in favor of families, are held out by the states, and the restraints and prohibitions noticed above have never been imposed. Nor are foreign restraints of this nature recognised. True, such foreign prohibitions are said to be ubiquitous; but this means only that they follow the subject to the new country, not as being enforceable against him there, but only as enforceable upon his return to his native country, or only so far as they can be enforced against him in the new country through property left by him in the old.

Nor can the local laws of foreign nations that are in derogation of principles of American policy be enforced in the United States when they are put in the shape of a judgment. The question arose in *DeBrimont v. Penniman*, 10 Blatchf. 436. DeBrimont, a French citizen, married, in France, the daughter of James and Cornelia Penniman, citizens of the United States. Subsequently Mrs. DeBrimont died, leaving a child of such marriage. Under the statute law of France, providing that a father-in-law and a mother-in-law must make an allowance to a son-in-law who is in need, so long as a child of the marriage is living, DeBrimont afterwards ob-

tained, in a court of France, a judgment or decree against James and Cornelia Penniman, then residing in France, in an action in which they were served with process and appeared, requiring them to pay to him a certain sum per year, in monthly payments, in advance, one-third of it to be for his use, and two-thirds of it for the use of the child. DeBrimont brought an action of debt, on this judgment or decree, in the United States Circuit Court, against the Pennimans, to recover the amount of the decreed payment for two years and seven months. It was decided that the suit could not be maintained, and that the laws of France upon which such decree was made, and the decree founded thereon, were local in their nature and operation. That they were designed to regulate the domestic relations of those who reside there, and to protect the public against pauperism. That they had no extra-territorial significance, and that they were to be executed upon persons and property within their jurisdiction.

The result of all this is that the law of Wurtemberg making the precedent consent of the king of that country essential to enable one of his subjects to marry abroad, is not and never was in force in Illinois or in any other American state. It is in derogation of American marital policy. Nor will any foreign judgment, amounting in fact merely to an expression of that law, be enforced to the extent of making the consent of the Wurtemberg government essential to the validity of an American marriage, or to the extent of declaring such a marriage null and void for want of such consent.

The case of *Simonin v. Mallac*, 29 Law Jour. (Prob. & M.) 97, bears directly upon this point. Valerie Simonin and Leon Mallac came from France to England to get married, in order to avoid the necessity of publication and parental consent. They were married in England, and afterwards the French

courts declared the marriage void. Later, Valerie removed to England and applied to an English court for a confirmatory decree of nullity, which was, however, refused, the court holding the marriage valid and declining to give any effect to the decree of nullity by the French court.

Said the English court: "Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or take the responsibility of not knowing, the law of that country. Now, the law of France is equally stringent whether both parties are French, or one only. Assume, then, that a French subject comes to England, and there marries without consent a subject of another foreign country, by the laws of which such marriage would be valid, which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not, then, be more just, and, therefore, more for the interest of all, that the law of that country should prevail which both are presumed to know, and agree to be bound by? Again, assume that one of the parties is English, would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law? But it may be said that in the case now before the court, both parties are French, and, therefore, no such difficulty can arise. That is true; but if once the principle of surrendering our own law to that of a foreign country is recognised, it must be followed out to all its consequences. The cases put are, therefore, a fair test as to the possibility of maintaining that by any *comitas* or *jus gentium* this court is bound to adopt the law of France as its guide."

Counsel for appellees in the principal case seeing the force of *Simonin v. Mallac* as authority against recognising the foreign decree of nullity, say that that case "was whether the English courts would recognise the *invalidity* of the old *status* of marriage which was valid according to English law," and continuing, they say: "The recognition of the first *status*, which was the marriage, is entirely a different question from the recognition of the second *status* created by the decree of nullity. * * * We are not asking this court to say that the marriage in Illinois was invalid. It was valid by our law. * * * But we are asking this court to recognise the new *status* created by the decree of nullity in the court of their domicile." To this may it not be replied that, if the decree of nullity is to be recognised at all, it must be recognised and accepted with all its consequences? These consequences are not merely the establishment for each party of a new *status* of single blessedness. Other and more important consequences result. Unlike a decree of divorce, which admits the first marriage to have been valid, the decree of nullity declares it to have been no marriage at all. Children born of the cohabitation are bastardized and deprived of their legitimate rights of inheritance. Both man and woman are divested of all right to each others property. If a foreign decree of nullity is valid and enforceable as to one of its consequences, *e. g.*, the establishment of a new *status* for each of the parties to it, is it not equally valid and enforceable as to any other consequence resulting from it, for example, to effect the illegitimation of children? If it be accepted with one of its legal consequences, must it not be taken with the others also? Would it be valid for the purpose of defining the *status* of husband and wife, but invalid for the purpose of defining the *status* of their children?

It is true that there is apparently some authority for saying there is no difference between a decree of nullity and a

decree of divorce, when the question comes up as to what effect is to be given to a foreign decree of either kind. Mr. Bishop (1 M. & D. sect. 354) says: "I am not aware that any difference of principle between such a decree and one of nullity was ever suggested, or that there is any foundation of reason for distinguishing the two," but he admits that "in the facts of most of the adjudged cases, the decree has been for the dissolving of a valid marriage, i. e., a decree of divorce." It is true, also, that Wharton (Conf. Laws, 2d ed. sect. 213), says: "The same general principles apply to processes to declare marriages null." But the next sentence says: "There must be domiciliary jurisdiction, and the proceedings must be regular," which shows the author to have spoken with reference, not to the effect in an American state, of a foreign decree of nullity, but merely to the procedure necessary to render a decree of nullity.

Story (Conf. Laws, sect. 595), says: "As to sentences confirming marriages or granting divorces, they may well stand upon a distinct ground. If they are pronounced by competent tribunals in regard to persons within the jurisdiction, there is great reason to say that they ought to be held of universal conclusiveness, force and effect in all countries," and counsel argue from this that there is no difference in principle between *confirming* a marriage by decree, or declaring it null by the same process; that the one process necessarily involves the other; and that if the decree be binding when decided for the defendant in a suit impeaching the validity of the marriage, that is, if the decree confirms the marriage, so must it be binding between the same parties, if the court should find for the plaintiff instead of the defendant, that is, if the court annuls the marriage. To this it seems proper to reply, first, that the decree in question is one of nullity; therefore, Judge STORY's remark, so far as they concern

a decree of divorce have no application; second, an American court would recognise as valid a marriage legally contracted within its jurisdiction, because to do otherwise would be to disregard the laws of its own government, and not because such marriage might happen to have been "confirmed" by some foreign tribunal; and third, there is a difference in consequence, if not in principle, between "confirming" and annulling a marriage. Confirmation of marriage does not dissolve marriage or illegitimize children, or take away property rights; but annulment does all this.

As to anything said in *Roach v. Garan*, 1 Ves. Sen. 157; *Barber v. Root*, 19 Mass. 265; *Cottington's Case*, 2 Swanst. 326 n.; and *Harvey v. Farnie*, Law Rep., 5 P. D. 153, to the effect that a foreign decree dissolving a marriage must be accepted by all countries as binding, the reply is that whatever was there said related to foreign decrees of divorce and not to foreign decrees of nullity.

Mr. Bishop's dictum, above quoted, is the strongest authority in favor of recognising as valid a foreign decree annulling a marriage. But his remarks do not show that he had the consequences of annulling a marriage fully in mind when he wrote. It is not apparent that his attention was especially called to the effect which recognising such a foreign decree would have either upon the legitimacy of children or upon the marital policy of the government.

It does not appear, therefore, that the authorities, excepting perhaps Mr. Bishop's dictum, show that a decree of nullity is as binding abroad as is a decree of divorce.

It may be concluded, therefore, that, as a decree of nullity, carrying all the consequences of such a decree, including the avoidance of the marriage *ab initio* and the illegitimation of children born of the union, such a judgment as that of the Wurtemberg court cannot be ac-

cepted as valid in Illinois. To do so would be to engraft a new rule upon the marital policy of that state. It would obligate immigrants to Illinois from countries where such consent is required to be obtained, to apply for and secure, before they marry, the consent of the governments whose jurisdiction they have left. Such a law needs only to be stated to be rejected as unsound.

And while it is clear that a foreign judgment of nullity cannot be wholly accepted in America as valid—that is, with all its consequences, including those of illegitimation and *ab initio* avoidance of marriage, its partial acceptance—for example, its acceptance to the same extent that a foreign decree of divorce is taken, *i. e.*, as establishing a new *status* for the parties to it, is not free from difficulties arising out of its effect as a decree of nullity. As Mr. Bishop says (2 M. & D., sect. 690): “The general doctrine is, that the parties are then (after the decree of nullity) regarded as if no marriage had taken place; they are single persons if before they were single,” and he quotes *Anstey v. Mannors*, Gow 10, that “If the wife becomes a single woman by operation of law, it is the same as if she had always remained single.” The meaning of this is, that the *status* of the

parties was never changed and continues to exist notwithstanding their attempted but void marriage. In other words, the effect of a decree of nullity of marriage appears to be not to establish any new *status*, but simply to declare that an old *status* continues to exist unaltered and unaffected by an attempted but absolutely null and void marriage. How can a decree of nullity of marriage be recognised as creating a new *status* where its effect is not to create any new *status*, but only to declare the existence and continuance of an old one? Counsel and court say the marriage in Illinois was a valid marriage. How then can they accept and enforce a foreign decree of nullity which says that the Illinois marriage was and is unlawful, invalid, not binding and *ab initio* null and void?

The reasoning and conclusion of the principal case may or may not be sound law. Further information, discussion and adjudication must settle this. But the decision certainly appears very questionable. One cannot but feel that it would rest upon foundations much more solid if grounded upon the American wife's agreement to renounce all her rights to her husband's American property.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Mississippi.

WILLIAM OLIVER v. JOHN C. LOVE.

The assignee of a covenant for title to land situated in Louisiana may maintain in Mississippi, a bill in equity to obtain reimbursement for expenditures made by him in resisting a suit and in extinguishing a paramount title asserted and maintained as to the land.

Semble, such assignee might also have maintained a suit at law for money paid out and expended for the use of the covenantor.

Whether an action for damages for an injury to land situated out of the state may not be maintained in the courts of Mississippi, *quære*.

A court of equity is not like a court of law fettered by the rule as to local and transitory actions.

APPEAL from Chancery Court of Copiah county.

The appellee exhibited his bill in said court to obtain reimbursement for expenditures made by him in resisting a suit and in extinguishing a paramount title asserted and maintained as to land situated in Louisiana, which the appellant had sold and conveyed with a warranty of title to one Smith, who assigned to the appellee. The bill was demurred to, because the land is in Louisiana, and the right of the complainant sprung not from contract but from privity of estate by reason of the covenant of warranty of title which ran with the land, and therefore the courts of this state can not give relief, because, it is said, and conceded on both sides, that an action founded in privity of estate is by the common law local and not transitory, and is not maintainable out of the jurisdiction in which it arose. The court below overruled the demurrer, whereupon respondent appealed.

The opinion of the court was delivered by

CAMPBELL, J.—It is the settled doctrine in England and America at common law that no *local* action can be maintained out of the jurisdiction in which it arose, and although this is, in many instances, to deprive a party of all remedy, the rule is said to be peremptory and inflexible. Accordingly, it has been repeatedly held, that trespass for injuries to land in one country or state can not be maintained in another, and that no recovery can be had on a covenant running with land by an assignee of the covenantee, except in the state where the land lies, even when the covenantor resides elsewhere: *Doulson v. Matthews*, 4 Term 503; *Livingston v. Jefferson*, 1 Brock. 203; *Watts v. Kinney*, 23 Wend. 484; s. c. 6 Hill 82; *Eachus v. Illinois & Mich. Railroad Co.*, 17 Ill. 534; *Worster v. The Winneb. Lake Co.*, 5 Foster 525; *Lienow v. Ellis*, 6 Mass. 331; *Clark v. Scudder*, 6 Gray 122; *University of Vermont v. Joslyn*, 21 Vermont 52; *White v. Sanborn*, 6 N. H. 220.

If this case is governed by the common law, the suit is not maintainable. All of the cases cited above rest upon the common law, and the distinction it made between local and transitory actions.

Originally, all actions were local, and great regard was had to place, so that every material allegation of a pleading had to be accompanied by the averment of a place, in order that a jury

might be summoned from the proper neighborhood, if issue should be taken on any of such allegations. The courts, in order to relieve against the difficulties which arose from the necessity of the proper venue in every action, took a distinction between matters which were local and those which were transitory, and invented a fiction whereby actions for causes of a transitory character, wherever they arose, might be maintained without regard to locality, "while no cognisance could be taken of local actions save where a jury of the county could be summoned to try them." A result was that for an injury to the person or chattels, and for a breach of any contract, even if it related to land a remedy might be had in the courts of another state or country than that in which the injury was done or in which the land lay. In other words, if the action was transitory and not local, it was maintainable anywhere.

The courts in England soon freed themselves from the fetters of locality, as to all causes of action of such nature that they might arise anywhere, and by means of falsehood, politely called fiction, and stated under a *videlicet*, which was an apology for not telling the truth, maintained actions on such causes of action as arose out of the territorial jurisdiction of the courts of England. But such causes of action as could from their nature arise only in one place, and therefore were considered as local, and to be redressed only by local actions, did not arise with the frequency of the other class, and did not press upon the courts sufficiently to induce them to include them in the fiction invented to sustain the other class of actions, and as to them the courts continued bound by the idea of the place at which they arose. Therefore it is that courts governed by the common law as to actions and process have felt bound to deny a remedy for causes of action arising abroad which could be redressed only by local action. Tried even by this rule an action might be maintained in the circuit court of Copiah county, by the appellee against the appellant, for by our law it is not local but transitory. The only local actions under our statute are ejectment and actions of trespass for injuries to land. They must be brought in the county in which the land lies. All other actions must be brought with reference to the person of the defendant.

The common-law distinction of local and transitory actions does not exist here. The statute alone governs, and we can not disregard it, and, because under the common law no remedy could be

had by the assignee of a covenantee in a covenant of warranty of title of land lying in another state, deny a remedy in the courts of this state, which does not treat such an action as a local one. The courts which have held such an action not maintainable have done so under the stress of the common law, which they felt so bound them as to constrain them to do what reason revolted at. Happily, we are freed from the constraint of this absurd rule, and look to our statutes to see what actions may be maintained by our courts. The appellee might maintain an action for money paid to the use of the appellant: *Kirkpatrick v. Miller*, 50 Miss. 521; *Dyer v. Britton*, 53 Id. 270.

In the last case cited Britton was an assignee of the covenantee, and was held to be entitled to maintain *assumpsit for money paid*. Certainly, that is not a local action, under the common law.

But apart from all this, which is conclusive of the case, this is not an action of law, but a suit in equity, which never was hampered by distinctions of local and transitory causes of action, as were courts of law. All of our courts must exercise their jurisdiction in proper places, but except as prescribed by statutes, the place which gave birth to a cause of action is of no influence in determining the jurisdiction of a court.

There is no objection to maintaining a suit in the courts of one state, because it arose out of a controversy about land in another state, for it is admitted that a remedy will be afforded by the courts of one state on a contract about land in another. And it is settled that an action by the covenantee for a breach of warranty of title is not local, but is transitory, because it is said to arise from contract, and, being transitory, it would follow that it might be maintained anywhere unaffected by the locality of the land.

In England the actions made transitory by the statute (32 Henry VIII. c. 34), were held to be freed from the feature of *locality* before affecting them. In Massachusetts a statute was held to have wrought a change in the character of an action otherwise a local one, and to authorize it to be brought elsewhere; *Summer v. Finegan*, 15 Mass. 280; *Pitman v. Flint*, 10 Pick. 504. This is the doctrine in Ohio: *Genin v. Grier*, 10 Ohio 209. See also, *Miller v. Thurmond*, 20 Mo. 477; *Graves v. McKeon*, 2 Denio 639.

We are by no means prepared to say that an action for damages for an injury to land situated out of this state may not be main-

tained in the courts of this state. This question is not now presented for decision, and is adverted to, lest we may be considered as committed to the doctrine that, because such an action arising in this state must be instituted in the county in which the land lies, therefore where the land lies out of the state, and the statute cannot be complied with, no action can be maintained. It may be that the statute regulating the venue of actions relates only to such local actions as arise in this state, and that all causes of action arising abroad, not involving recovery of possession of land, are maintainable by the court of that county where the defendant may be found.

We leave this an open question.

Decree affirmed.

The statement of facts in the principal case does not disclose whether it is one maintainable in a court of equity by reason of its jurisdiction to decree specific performance, reformation or rescission or an injunction, with powers extended to decree damages by legislation similar to "Lord Cairns's Act," 21 & 22 Vict., c. 27, or whether the jurisdiction was acquired by state statutes enlarging the jurisdiction of courts of equity. Without such legislation it might not be maintained, irrespective of any question of the differences between local and transitory actions, as there would be an adequate remedy at law for the damages sued for, and it is probable a demurrer for that cause would have been sustained: *Rawle Cov.* (4th ed.) 648; 2 *Danl. Ch. Pr.* (5th ed.) 1081.

The statutory modification of the common-law distinctions between local and transitory actions referred to in the principal case will probably be found in most if not all the states having codes of practice. These generally direct when, how and where actions may be brought, with almost sole reference to the residence or place where the defendant is found; and in directing what actions shall be brought in the county where the land lay they confine the restriction, as in the Mississippi statute, to ejectment

and trespasses on the land. But now and then we come across some old common-law draughtsman whose statute requires "suits of a local nature" to be brought within defined territorial limits: U. S. Rev. Stat., sects. 740, 741, 742, 744. The denial of all remedy in such cases, that sometimes results where the defendant cannot be found in the particular district to which the plaintiff is confined, is obviated by these federal statutes, if he resides in the same *state*, by sending the writ to that district in which he does reside. Otherwise these statutes would seem to impose all the old-fashioned "fetters of locality," as Mr. Justice CAMPBELL calls them, unless we are to interpret the phrase "suits of a local nature" according to the law of the state in which the suit is brought, and not according to the common law. It might be interesting to note whether the principal case could have received the same intelligent judgment if it had been brought in a federal court or removed thereto—aside from the manifest difficulty of any jurisdiction of a federal court of equity over it—which had its jurisdiction so restricted; and if not, would we not have the common-law predicament, under some circumstances, of leaving the plaintiff practically without remedy? These questions are more easily

asked than answered by any adjudications to be found affording a solution. And the opinion suggests with silent force the perplexities that lie within these words, "suits of a local nature," remarkably dormant though they be, for the reason, perhaps, that except in ejectment where we get along without any defendant but the actual occupier, this class of suits is rare in all courts.

Again, whether these sections of the revised statutes are at all affected by the Act of March 3d 1875, 18 Stat. 470, as is intimated by the compiler of the supplement—Rev. Stat., 1 Supl. 173—may be questionable. But if they are modified or repealed by that act the perplexities above mentioned are increased, for the want of uniformity in the legislation of Congress on the subject and its defective character, if they be repealed, becomes apparent on comparison of the repealed sections with the special acts establishing new districts or prescribing additional places for holding the courts. In some of them this phraseology in reference to "suits of a local nature" is kept up without the full provisions on the subject contained in the old Act of 1858 carried into the revised statutes at the sections above cited, and the repeal of which is intimated: Rev. Stat., 1 Supl. 508, ch. 17, sect. 4; Id. 509, ch. 18, sect. 4; Id. 536, ch. 120, sect. 2; Id. 548, ch. 203, sect. 5; Id. 384, ch. 359, sect. 1, par. 17; Id. 415, ch. 97; Id. 262, ch. 41; Id. 407, ch. 43; Id. 376, ch. 326, sect. 2. Some of these statutes provide for suits "not of a local nature," but make no provision for those that are of "a local nature," while others are entirely silent on the subject; that in reference to Michigan, however, says, "The said circuit and district courts may regulate by general rule the venue of *transitory* actions, either in law or equity, and may change the same for cause," which is an anomalous arrangement. If, therefore, the Act of 1858, Rev. Stat., sects.

740, 744, be repealed by the Act of 1875, there is no longer any provision for suits of "a local nature," such as is found in those sections. It will be observed, also, that some of these statutes pertain to suits in their relation to separate districts in the same state or to divisions of the same district, while none of them in terms provide for the distinctions of the subject arising out of the location of the land in another state, as in the principal case, though it would seem an implication from the act of 1858 that "suits of a local nature" could not be brought out of the state where the land lay, although the defendant may be found in another district, and in transitory actions suable there. If these statutes may be confined in their legislative command so that they are to be treated as mere regulations of procedure—and not *jurisdictional* in a technical sense—to govern the *inter-district* practice in the same state, the difference between local and transitory actions is left by congressional legislation in its *inter-state* application, to the influence of the common law, unless indeed the broad language of all the judiciary acts giving jurisdiction in "all civil suits," and providing that "no civil suit shall be brought against an inhabitant of the United States, by any original process in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ," may be held to have abolished these distinctions altogether: U. S. Rev. Stat., sects. 629, 739; Rev. Stat., 1 Supl. 173, ch. 137. Except, of course, in that very limited class of cases where the *international* obstacle to enforcing a judgment for the delivery of possession of lands in a foreign jurisdiction exists. And here it may be worthy of remark that sometimes there is a manifest inattention to this feature of the subject. Deferentially, it may be suggested that those cases and authors that find the governing principle which refuses jura-

diction over actions pertaining to land in a foreign state grounded in the common-law distinctions as to *venue* between local and transitory actions in the kingdom of England confuse our ideas and mislead us. It may be a bold thing to say that this is an absolute error, and that the two principles are as distinct as two things can be, for if an error at all it is venerable with age and sanctioned by the highest authority; but hoary as it is, its absolute correctness has been and may again be challenged. The reason why a court in England cannot entertain jurisdiction of an action of ejectment for lands in France is not because the jury should be summoned from the vicinage and have a knowledge of the witnesses, but because there is no power to enforce the judgment and no sort of governmental authority over the land. The owner being within the kingdom of England, does not, under the principles of international law, confer the jurisdiction to do that thing. So, where the object of the suit is to effect a transmission of the ownership or title, France will not, and international law does not require her to recognise any operation of the laws of England to transmit the title; nor need she, if the English courts happen to have the owner within their grasp and compel him by a notarial act or deed strictly according to the law of France to convey the title, recognise a transfer so coerced. She may or may not at her pleasure give effect to such transfers. Obviously actions like that of the principal case, or *quare clausum fregit*, do not come within the operation of this principle, and there is nothing in it to forbid the English courts from awarding damages and satisfying them out of any property in England. The courts may decline the jurisdiction for any unsatisfactory reason like that of the *venue* in local actions, and it seems they do where the common law prevails, but that it is not an inherent want of *jurisdiction* is shown by the fact that if the law of the

foreign state affords no remedy the common-law courts will not decline one. They must decline or render abortive judgments where the case falls within the *international* principle above mentioned, and they have no choice about it, but the operation of that principle is exceedingly limited, and does not depend on any of the vague if not inconsequential differences between local and transitory actions as laid down in the books, but on a want of authority to enforce the judgment that is demanded in the particular case. Even in a court of equity acting *in personam* to compel the transfer of the title according to the law of the place where the land is situated, the judgment would be abortive if the foreign law should refuse to recognise a title so obtained, and hence the court will not entertain jurisdiction for that purpose alone, and only acts on the title incidentally, when it has jurisdiction for some other well-recognised purpose which will be sustained, and to this extent a court of equity is controlled by the law of local and transitory actions: *Massie v. Watts*, 6 Cr. 148; *Muller v. Dows*, 94 U. S. 444.

Returning for the moment to the federal statutes, it is apparent that they present a phase of the subject that it would be interesting to consider more at length than the space allotted to a note permits. In suits at law there seems to be some escape from the difficulties they present when read in the light of the erudition of the principal case by defining the words "suits of a local nature," according to the state laws as in other matters of practice, and not according to the common law. For example, there is no reason in this day and generation why an action of trespass, *quare clausum fregit*, which is local at common law, should not be brought in any state where the defendant is found, and under a common count for money had and received in the same way the principal case indicates the action there might have been sustained

under a count for money paid out and expended. These reforms belong to the legislatures and not the courts. But Congress might, through its own committees or commissions capable of instituting the reforms, bring the laws up to the standard of the best modern improvements, and establish a code that would regulate uniformly the practice of its courts in the exercise of the judicial power they possess. At least it could define what it means by "suits of a local nature," and not leave the courts to grope in the dark places Mr. Justice CAMPBELL throws light upon. Specific definitions in statutes like these are better than generalizations, for reasons that are plain in that light, and more particularly since they are made for a jurisprudence that has no common law of its own, and constantly refers us to differential systems of state laws that often furnish no guide where the acts of Congress are silent. The probability is, that if the suit Mr. Justice CAMPBELL was deciding had been brought in the federal court of equity it would have been dismissed; and if brought at law, unaided by the Mississippi statute, it would have been dismissed, and yet, the acts of Congress forbid its being brought in any other state than where the defendant resides or is found. And if the laws of Louisiana treat it as a transitory action, as they probably do, although "a suit of a local nature," there could be no remedy there as long as the defendant should remain out of that state.

This note will be closed with a mere reference to authorities that may be useful to the reader in his investigations, as the space assigned prevents any more extended examination of them: *McKenna v. Fisk*, 1 How. 241; *Mitchell v. Harmony*, 13 Id. 115; s. c. 1 Blatch. 549; *Watts v. Waddle*, 6 Peters 389; s. c. 1 McL. 200; *Boyce v.*

Grundy, 9 Peters 275; *Northern, &c., Railroad v. Michigan, &c., Railroad*, 15 How. 233; s. c. 5 McL. 444; *Miss. & Mo. Railroad v. Ward*, 2 Black 485; *McMicken v. Webb*, 11 Peters 25; *Cherokee Nation v. Georgia*, 5 Id. 179; *Brine v. Ins. Co.*, 96 U. S. 627, 635; *Casey v. Adams*, 102 Id. 66; *Dennick v. Railroad Co.*, 103 Id. 11; *Rundle v. Delaware, &c., Canal Co.*, 1 Wall. Jr. 275, 282, and note; s. c. 14 How. 80; *Gorman v. Marsteller*, 2 Cr. C. C. 311; *Carrington v. Brents*, 1 McL. 167; *Westerwelt v. Lewis*, 2 Id. 511; *Tardy v. Morgan*, 3 Id. 358; *Pirquet v. Swan*, 5 Mason 35, 42; *Briggs v. French*, 1 Sumner 504; *Lyman v. Lyman*, 2 Paine 11, 46; *Vore v. Fowler*, 2 Bond 294; *Cage v. Jeffries*, 1 Hempst. 409; *United States v. Anes*, 1 Wood. & Min. 76; *Stillman v. White Rock, &c., Co.*, 3 Id. 538; *Foot v. Edwards*, 3 Blatch. 310; *Kanawha Coal Co. v. Kanawha Coal Co.*, 7 Id. 391; *Wheeler v. McCormick*, 8 Id. 267; *Locomotive, &c., Co. v. Erie Railroad*, 10 Id. 292; *Cunningham v. Ralls*, 1 Fed. Rep. 453; *Rutz v. St. Louis*, 7 Id. 438; 1 Spence Eq. 684-699; 1 Tidd's Pr. 363, 428, 601, 610; 1 Washb. Real Prop. 522; Gould's Pl. Ch. 3; Cooley on Torts 470; Whart. Confl. Laws 290, 711; Bouv. Dic., Abb. Dic. tit. *Venue, Local Actions, Transitory Action*: 1 Wms. Saund. 247 and note; 1 Chit. Pl. 298; 1 Bac. Abr. 78; 10 Id. 364; 2 Danl. Ch. Pr. 1112; 7 Jac. Fish. Dig. 9983; Rawle Cov. 234, 532, 533; Waterman Spec. Perf. 22, 48; Alb. Law Jour. 47, 119, 219; 7 Cent. Law Jour. 1, 2; *The Mozham*, 1 P. D. 45, 107; *Whittaker v. Forbes*, 1 C. P. D. 51; *McGregor v. Topham*, 3 Hare 132; *Buenos Ayres, &c., Railroad v. Northern, &c., Railroad*, L. R. 2 Q. B. Div. 210; s. c. 16 Am. Law Reg. 359 and note. The state cases are far too numerous for citation.

H.

Supreme Court of Errors of Connecticut.

GEORGE T. MEECH v. SIDNEY A. ENSIGN.

In the ordinary case of a purchase of an equity of redemption from a mortgagor, with a provision in the deed that the grantee assumes and agrees to pay the mortgage debt, no right of action on the promise accrues to the mortgagee.

To give the mortgagee a right of action the promise must have been intended for his benefit ; it is not enough that a benefit may accrue to him.

ACTION by a mortgagee against the purchaser of the equity of redemption to recover a balance due on the mortgage debt. The facts were as follows :

The plaintiff held a mortgage on real estate. The defendant purchased the equity of redemption, agreeing with the mortgagor to pay the mortgage debt. Subsequently the mortgage was foreclosed, the property then being worth less than the mortgage debt, leaving a balance unpaid. This action was brought to recover the balance. The promise was not assigned to the plaintiffs but was discharged by the mortgagor before the suit was brought. The question of the defendant's liability was reserved for the advice of this court.

F. H. Parker and *M. E. Culver*, for the plaintiffs.

H. S. Barbour and *C. Lounsbury*, for the defendant.

The opinion of the court was delivered by

CARPENTER, J.—The case differs from the other cases on this subject that have heretofore been before this court. We now have the naked question whether the owner of a debt secured by a mortgage may maintain an action on the promise, made by the purchaser of the equity of redemption to the mortgagor, to pay the debt, without an assignment of the right of action which that promise gives. As a rule actions on contracts can be brought only by him with whom the contract was made and from whom the consideration moved. The legal title is deemed to be in him alone and strangers to the contract cannot sue. The rule is a salutary one and should not be departed from except for good reasons. There are, however, some exceptions to it. Actions of assumpsit may be maintained in some instances where there is no express contract with the plaintiff and where the consideration does not move from him. If A. receives money from B. to be paid to C., C. may

maintain an action against A. These cases, however, are exceptions only in appearance. They, in fact, recognise the general rule and are really within it; for the action is not brought on the express promise by A. to B., but on an implied promise by A. to pay the money to C.

Another class of exceptions is where the contract has for its object a benefit to a third party and is made with that intent. Some early English cases in which promises were made to a father, or made for the benefit of a child or nephew, are instances of this class.

There may also be cases in which a third party may have some peculiar equity in the subject-matter of a contract which will enable him to maintain a bill in equity to enforce it. Does this case fall within any exception recognised by authority and supported by principle?

Before alluding to decided cases let us examine the case with some care in the light of the circumstances, for the purpose of discovering just what the intention of the parties was and precisely what the defendant promised to do; for courts always in enforcing contracts intend to give effect to the intention of the parties; and when that intention is discovered in respect to a legal and valid contract it is the inflexible and imperative law of the case. And it is a necessary part of the rule itself that the courts will not so construe and enforce a contract as to bring about a result not expressed in the contract and not intended by the parties.

What was the transaction? It was not a sale of a piece of land for a fixed price, equal to the value of the land, so as to create a debt for that sum, but was simply a sale of the equity of redemption. The distinction between the land, unincumbered, and the equity of redemption, is obvious enough, and is an important one, as on it depends in a great degree the rights and obligations of the parties.

The defendant purchased the equity of redemption. The finding is that the mortgagor "conveyed to the defendant said real estate subject to said mortgage." So that the only debt brought into existence by the transaction was the price agreed to be paid for the equity of redemption. The mere purchase raised no debt to the mortgagee which the defendant was to discharge. By the contract of assumption he obligated himself to the mortgagor to pay the mortgage. Whether that raised any personal obligation to

the mortgagee is the question in the case. If the probable intention of the parties is to govern, it is difficult to find any such liability in the transaction. The mortgagee was not a party to it, no part of the consideration moved from him and he was in no worse condition because of it. He still had the security of the land and the personal responsibility of the mortgagor, and that is all he contracted for or required. The parties contracted with reference to their own interests, not his; to benefit themselves, not him. He had no legal or equitable interest in the contract, and there is no room for the presumption that it was intended for his benefit.

There was no agency, express or implied. The mortgagor would doubtless be surprised at the suggestion, should it be made, that he was acting as the agent of the mortgagee. There was no substitution or novation, for that requires three parties, and here were only two; besides the original debtor was not discharged. It was not the object of the parties to give the mortgagee additional security; and to interpret it in that sense is to give it a force and a meaning never contemplated by the parties, and is, in effect, making a contract for them. The only contract which they made was simply this, the defendant agreed that he would pay the mortgagor's debt. The promisee alone had the legal and equitable interest. It follows that he alone can enforce it, unless he imparts that right to others. That he may sue will not be disputed. If the mortgagee has that right by force of the contract then two persons wholly independent of each other have an equal right. If either may sue both may, and a suit by one will not abate or bar a suit by the other; and a discharge by one for any cause short of a fulfilment will not discharge the contract. Thus the promisor may be harassed with two suits at the same time on the same contract; and if he would compromise with the promisee he must obtain the consent of a stranger. If this is the law it is an anomaly, for another instance of the kind is hardly to be found in the whole range of jurisprudence. We are aware that there are decisions from courts of the highest authority, and whose opinions are entitled to the highest respect, which hold that the creditor may sue on such contracts; perhaps it is not too much to say that the prevailing current of authority in this country is in that direction; but believing as we do that they are not founded in good reason or sound policy we cannot accept them as law. The question is an open one in this state, and principle rather than precedent not founded in principle should determine it.

We cannot undertake to examine in detail the cases alluded to; we can only refer in a general way to the reasoning by which they are supported. It is interesting to note the various grounds on which they stand, some of which are not only weak in themselves, but fail to strengthen the others. It is an argument of no little weight against the correctness of decisions which seem to require disconnected and inharmonious reasons to sustain them.

Some of the cases seem to proceed "upon the principle that if one person makes a promise to another, for the benefit of a third person, that third person may maintain an action on the promise;" and that without regard to the question whether the benefit to a third person was the principal thing intended or was a mere incident: *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 Id. 178; *Thorp v. Keokuk Coal Co.*, 48 Id. 253; *Davis v. Calloway*, 30 Ind. 112.

In cases of this class the reasoning is not uniform. In some, it is suggested that from the express promise to the promisee the law implies a promise to the third person. In others the principle of agency is invoked, and the mortgagor in making the contract is treated as the agent of the mortgagee. The difficulty with this last position is that it is contrary to the facts.

In *Urquhart v. Brayton*, 12 R. I. 169, DUFFEE, C. J., holds the defendant liable to a third person on the ground of a novation, while POTTER, J., in the same case places the liability on the ground of money had and received.

There seem to be several difficulties in treating it as a novation; 1st, it changes the nature of the contract; 2d, it requires a third party and here are but two; and 3d, an essential element of a novation is wanting, the discharge of the original debtor.

In other cases the transaction is treated as a sale of the land, irrespective of the mortgage, and a retention by the purchaser of a portion of the purchase-money to be paid to the mortgagee: *Hoff's Appeal*, 24 Penn. St. 200; *Urquhart v. Brayton*, *supra*; *Blyer v. Monholland*, 2 Sandf. Ch. 478.

When the circumstances will warrant that view of the facts there is no difficulty. In such cases the debtor actually places or leaves the money in the hands of the promisor to be paid to the creditor, and the action for money had and received may be maintained not on a promise to the debtor, but on an implied promise to the creditor.

Other cases, and this class includes a large number, resort to the doctrine of suretyship; *Blyer v. Monholland, supra*; *Curtis v. Tyler*, 9 Paige 432; *King v. Whitely*, 10 Id. 465; *Bissell v. Bugbee*, 7 Reporter 550; *Crowell v. Currie*, 27 N. J. Eq. 152.

We agree that that ground would be tenable in equity, at least if that was the real contract between the parties; that is, if the parties really intended by the transaction to furnish additional security to the creditor. If not, it seems to us difficult to support the decisions upon that ground. In order to do so the court must assume, without reason and contrary to the fact, that such was the object and purpose of the contract. We have already endeavored to show that it was not. Let us examine the subject a little further. There is no express contract of suretyship. Whatever element of suretyship there is results by operation of law from the position in which the parties place themselves. The defendant agreed with the debtor that he would pay the debt. As between themselves he thereby became the principal debtor. The original debtor not being discharged he was also liable to the creditor. If compelled to pay he was a surety only in this, that he had a right to call on the defendant to indemnify him. But all this did not affect the creditor and he is not a party to it. What interest has he in the transaction? and in what consists his equity? To make that relationship available to him it is necessary not only to bring him into contract relations with the other parties, but also to reverse the positions of the principal and surety and make the purchaser the surety instead of the principal. Upon what principle can that be done? By what process of reasoning can it be vindicated?

Again, there is no implication of suretyship as between the creditor and the other parties, as no such implication is necessary in order to give full effect to the intention of the parties.

We come now to a class of cases which constitute an important exception to the rule we are considering, that suits must be brought by the party making the contract and from whom the consideration moved. We refer to those cases in which the parties confessedly contracted for the benefit of third persons, not incidentally but as the principal object. Some of the cases cited by the plaintiffs are cases of this description and are not applicable to the case at bar. There may be cases, however, in which this principle is invoked to sustain actions by the mortgagee against the purchaser of the equity of redemption.

The principle itself is best illustrated by a brief reference to a few of the leading cases. In *Dutton v. Pool*, 1 Ventris 318, the defendant promised the father to pay the daughter a sum of money as a marriage portion. It was held that the daughter might sue on the promise. The relation of the father to the daughter and his obligation to give her a marriage portion seem to be adopted as a substitute for privity of contract. Some of the decisions in the state of New York have taken a similar view, and treat the obligation of the mortgagor to the mortgagee as a "substitute for privity," or "privity by substitution," to connect the mortgagee with the contract: *Vroom v. Turner*, 69 N. Y. 280, and cases cited. *Dutton v. Pool*, in modern times in this country, would be upheld on the ground that the promise was intended for the benefit of the daughter as its object. In *Felton v. Dickinson*, 10 Mass. 287, the defendant promised the father of a minor son to pay the son a sum of money for his services. After performing the services it was held that the son might maintain an action in his own name.

In *Farley v. Cleveland*, 4 Cow. 432 (same case in error 9 Cow. 639), the defendant bought hay of the debtor, in consideration of which he promised to pay the debt due the plaintiff. The plaintiff maintained a suit in his own name.

In *Hendrick v. Lindsay*, 93 U. S. 143, the defendant promised A. that if he would sign a bail-bond he would give him a bond of indemnity. A. and B. signed the bail-bond, and it was held that they could jointly maintain an action on the promise. In these cases there is no difficulty in discovering an intention to benefit the third person. And yet this exception seems not now to be recognised in England: *Tweddle v. Atkinson*, 1 B. & S. 393.

Even in Massachusetts the tendency is to narrow the exception and adhere more rigidly to the rule: *Exchange Bank v. Rice*, 107 Mass. 39.

It seems to us that the exception to the rule is a reasonable one, and should prevail.

The question then recurs, is the case at bar within the exception?

We have already expressed our views as to the nature of the contract and the real interest of the parties. If we are right it is clear that the question must be answered in the negative. That the incidental advantage to the creditor (if it is an advantage

to have his debt paid by one man rather than another), is not such a benefit as the exception contemplates, is apparent from a consideration of the possible and even probable consequences of holding it to be so. The case before us affords a good illustration. The debtor is insolvent, and the property mortgaged has largely depreciated, so that it fails to pay the debt. Now if the plaintiffs may recover the balance of the defendant, they have a security for their debt which they did not originally have, which they never contracted for, and which the contracting parties did not intend that they should have. It in effect makes him the absolute guarantor of the debt.

Whatever doubt may have existed as to the state of the law in New York on this subject it seems to be set at rest, for the present at least, by recent decisions.

In *Garnsey v. Rogers*, 47 N. Y. 233, which was an action like this, the court says, RAPALLO, J.: "I do not understand that the case of *Lawrence v. Fox*, 20 N. Y. 288, has gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being neither privy to the contract nor the consideration. To entitle him to an action the contract must have been made for his benefit. He must be the person intended to be benefited." Again, "If such a contract could be enforced by the creditor, who would be incidentally benefited by its performance, every agreement by which one party should agree with another, for a consideration moving from him, to become security for him to his creditors or to advance money to pay his debts, could be enforced by the parties whose claims are thus to be secured or paid. I do not understand any case to have gone this length."

The case of *Merrill v. Green*, 55 N. Y. 270, was this: Roberts and Green were partners. They dissolved and Green and one Nichols executed a bond to Roberts, conditioned that Green should pay all the partnership debts. In a suit on the bond by a creditor it was held that creditors could not sue. GROVER, J., says: "Green was liable with Roberts for the payment of the firm debts. He agreed with Roberts upon a valid consideration to assume the payment of the whole of the debts, and Nichols undertook that he should perform this contract. This was no agreement made by Green and Nichols with the creditors or for their

benefit, but one with Roberts to exonerate him from his liability for the debts of the firm, payment of which Green was to make, and in case of his default such payment to be made by Nichols. All the liability incurred by either was upon the bond, and this was to the obligees only."

The case of *Vroom v. Turner*, 69 N. Y. 283, was also the case of a mortgage. ALLEN, J., says: "To give a third party who may derive a benefit from the performance of the promise an action there must be first an intent by the promisor to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited."

In *Singoon v. Brown*, 68 N. Y. 361, the court says: "But it is not every promise made by one to another, from the performance of which a benefit may accrue to a third person, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must have been made for his benefit as its object, and he must be the party intended to be benefited."

We advise the Superior Court to render judgment for the defendant.

In this opinion the other judges concurred.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

COURT OF ERRORS AND APPEALS OF NEW JERSEY.²

SUPREME COURT OF OHIO.³

SUPREME COURT OF PENNSYLVANIA.⁴

SUPREME COURT OF WISCONSIN.⁵

ATTACHMENT. See *Conflict of Laws*.

Conflict of Laws—Order in one State on Corporation in Another.—An order made by force of the New York code, upon a debtor of a defendant in a judgment, to pay the debt due to the plaintiff in the judgment, in part satisfaction thereof, will be held to be conclusively

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

² From Hon. John H. Stewart, Reporter; to appear in 35 N. J. Eq. Reports.

³ From E. L. DeWitt, Esq., Reporter; to appear in 37 or 38 Ohio St. Reports.

⁴ From Hon. A. Wilson Norris, Reporter; to appear in 95 Penn. St. Reports.

⁵ From Hon. O. M. Conover, Reporter; to appear in 54 Wisconsin Reports.

binding in New Jersey: *Elizabethtown Sav. Ins. v. Gerber*, 35 N. J. Eq.

And if the debt so ordered to be paid were in the custody of the Court of Chancery, such foreign order of judgment would lay in itself a ground for a bill seeking such money: *Id.*

But where such moneys were in the hands of a corporation of New Jersey, and it appeared that such corporation was not cited in the proceeding in New York, and did not appear therein such foreign order requiring it to pay said moneys is void: *Id.*

Query—Whether moneys can be attached in a foreign state in the hands of a litigant in the courts of New Jersey when the time for pleading, on the part of such litigant, has expired: *Id.*

ATTORNEY.

Disbarring—For what Offences.—An attorney can only be disbarred for misconduct in his professional capacity or respecting his professional character: *Ex parte Steinman and Hensel*, 95 Penn. St.

Although there may be cases of misconduct not strictly professional which would clearly show a person to be unfit to be an attorney, as theft, forgery or perjury, yet even for such an offence he cannot be summarily disbarred, without a formal indictment, trial and conviction: *Id.*

Courts have jurisdiction and power upon their own motion, without formal complaint or petition, in a proper case, to strike the name of an attorney from the roll provided he has had reasonable notice and an opportunity to be heard: *Id.*

The office of an attorney is his property, and he cannot be deprived of it unless by the judgment of his peers and the law of the land. To deprive him of it summarily for the publication of a libel on a man in a public capacity, or where the matter was proper for public investigation, would be unconstitutional: *Id.*

A libel of the court, to amount to a breach of professional duty, must have been designed to acquire an influence over the judge in the exercise of his judicial functions by the instrumentality of popular prejudice: *Id.*

BAILMENT.

Lien of Workman.—It cannot be doubted that a lien is given by the common law to a tradesman or artisan who, in the course of his trade or occupation receives personal property upon which he bestows labor, &c., and his right to a lien on the property is equally good whether there be an agreement for a stipulated price or only an implied contract to pay a reasonable compensation: *Hensel v. Noble*, 95 Penn. St.

It is equally clear on principle as well as authority that where there is an entire contract for making or repairing several articles for a gross sum, the tradesman has a lien on any one or more of the articles in his possession, not only for their proportionate part of the sum agreed upon for repairing the whole, but for such amount as he may be entitled to for labor, &c., bestowed upon all the articles embraced in the contract: *Id.*

BILL OF REVIEW.

Not Granted by Court of Appeal.—Where the Court of Errors and

Appeals has rendered a decree after hearing on the merits, and the decree has been entered in the minutes in accordance with the views of the court, and the record has been regularly remitted to the court below, it has no further jurisdiction of the case, and therefore will not entertain an application for leave to file a bill of review. Such application is to be made to the Court of Chancery: *Putnam v. Clark*, 35 N. J. Eq.

BUILDING ASSOCIATION. See *Corporations*.

CONFLICT OF LAWS.

Attachment—Receiver—Rolling Stock of Railroad.—In a suit in chancery, pending in a Kentucky court, wherein the trustees of an insolvent railroad corporation sought to enforce their rights under certain mortgages of the road and its equipment, the conditions of which had been broken, an application was made for the appointment of a receiver to take charge of and operate the road. Pending this application, certain rolling stock covered by the mortgages was temporarily in Ohio, and while there was seized in attachment by an unsecured Kentucky creditor. The entire property was insufficient to pay the debts secured by the mortgages, or to earn income to pay the interest. The order of the court appointing a receiver, made subsequent to the seizure in attachment, ordered him to take possession of all the property, including that seized, and authorized him to sue in his own name as such receiver, whenever necessary to perform his duties. *Held*, that the mortgages covered the rolling stock, though temporarily in Ohio, and the receiver might, under the comity between states, by an action brought in that state in his own name, assert his right to the possession thereof, where such right is not in conflict with the rights of the citizens of the latter state, nor against the policy of our laws: *Merchant's Nat. Bank v. McLeod*, 37 or 38 Ohio St.

CONSTITUTIONAL LAW

Statute—Failure of Title to Indicate Contents.—An entire Act of Assembly is not necessarily unconstitutional because the title fails to give notice of some particular matter contained therein. The rule has been to sustain that portion of which the title gives notice: *Dewhurst v. City of Allegheny*, 95 Penn. St.

CORPORATIONS. See *Insurance*.

Corporations de facto—Liability of Stockholders to Creditors.—Where a corporation *de facto*, in a proceeding in quo warranto, has been ousted from the franchise of being a corporation, such ouster is no defence to a suit by a creditor against stockholders to enforce payment of their stock subscriptions. *Gaff v. Flesher*, 33 Ohio St. 115, 453, approved and followed: *Rowland v. Meader Furniture Co.*, 37 or 38 Ohio St.

Corporations *de facto* and *de jure* stand on the same footing as respects their liability to creditors; and the liability of the stockholders of the former, whether arising by statute or on stock subscription, may be enforced for the benefit of creditors, the same as the liability of the latter: *Id.*

Director—Agreement for Repayment of Mortgage.—A director of a building association, who gave to the association an ordinary bond and mortgage for a loan, cannot set up as a defence to its foreclosure that by a secret parol agreement between him and the other directors the loan was to be and had been repaid and the mortgage satisfied by his shares of stock in the association having been fully paid up after the loan was made: *Pangborn v. Citizens' Building Association*, 35 N. J. Eq.

Acts beyond Corporate Powers—Who can take Advantage of—Wharf.—The fact that the use of a wharf by a railroad company as a public wharf is *ultra vires* is no ground for an injunction at the suit of one whose only interest is that as lessee of an adjoining public wharf he will be injured by the competition in business: *New Orleans M. & T. Railroad Co. v. Ellerman*, S. C. U. S., Oct. Term 1881.

Contract to Purchase Stock from Stockholder.—An executory agreement between a manufacturing corporation and one of its stockholders, for the purchase of the stock of such corporation, by the former from the latter, cannot be enforced either by action for specific performance or for damages: *Coppin v. Greenlees & Rawsom Co.*, 37 or 38 Ohio St.

COSTS. See *Judgment*.

CRIMINAL LAW.

Juror—Previous Opinion.—A person summoned as a juror who states upon his *voir dire* that he has formed or expressed an opinion, touching the guilt or innocence of the accused is *prima facie* incompetent, and such *prima facie* incompetency is not removed until it has been made to appear that such opinion was formed from reading mere newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and that, notwithstanding such previously formed or expressed opinion, the juror is able to render an impartial verdict upon the law and the evidence: *McHugh v. State*, 37 or 38 Ohio St.

Frazier v. State, 23 Ohio St. 551, followed and approved: *Id.*

DAMAGES. See *Patent*.

EQUITY. See *Tax*.

ERRORS AND APPEALS.

Interlocutory Orders—Master's Report—Failure to File Exceptions.—An appeal from a final decree brings before the appellate court all interlocutory orders or decrees involving the merits: *Clair v. Terhune*, 35 N. J. Eq.

On appeal from the final decree, the appellate court will decide whether a decree of reference, prescribing the limits of the accounting, be right. But items clearly within the limits of the reference, not allowed by the master, where exceptions to the report have not been filed, will not be considered: *Id.*

Action for Penalty Imposed by Ordinance—Quasi Criminal Proceeding.—When a city or village ordinance prohibits that which is a

crime or misdemeanor and punishable at common law or by statute, and prescribes a penalty for its violation by fine, with imprisonment on default of payment, the action to recover such penalty is *quasi* criminal, and cannot be brought to this court on the plaintiff's appeal: *President, &c., of the Village of Plattsville v. McKernan*, 54 Wis.

EVIDENCE.

Medical Books.—Portions of medical books cannot be read to the jury as evidence, although such books have been shown by expert testimony to be "standard works in the medical profession:" *Stilling v. Town of Thorp*, 54 Wis.

EXECUTION. See *Injunction*.

Sheriff's Sale—Title of Purchaser.—The sheriff sells only the title of the defendant in an execution, and the real owner besides trespass against the sheriff may maintain replevin or trover against his vendee: *Reichenbach v. McKean*, 95 Penn. St.

In the case of a pawn or pledge there is a special property in the pawnee. It is liable to be sold on an execution against the pawnor but subject to the rights and interests of the pawnee: *Id.*

The taking of the property out of the possession of the pawnee by a sheriff's sale does not divest his property, is in no sense a relinquishment of his lien, and a *bona fide* purchaser from the sheriff's vendee takes it subject to said lien: *Id.*

EXECUTORS AND ADMINISTRATORS.

Deposit in Bank—Loss.—Where an administrator deposits in his own individual name funds of the estate, in a bank which fails while holding such deposit, the loss is his own, and not that of the estate; and this though he has no other funds in such bank, and informs its officers, at the time of making the deposit, that the funds are held by him in trust. A remark by PAINE, J., in *School District v. Zink*, 25 Wis. 636, so far as inconsistent with this view, overruled: *Williams v. Williams*, 54 Wis.

FRAUDS, STATUTE OF.

Written Negotiations—Failure to Execute Formal Agreement.—Where, in cases within the Statute of Frauds, the negotiations have been conducted in writing, if there has been a final agreement between the parties, the terms of which are evidenced in a manner to satisfy the statute, the agreement will be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, to be prepared and signed. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his lawfully authorized agent, there exist all the materials which the court requires to make a legally binding contract: *Wharton v. Stoutenburgh*, 35 N. J. Eq.

HUSBAND AND WIFE.

Joint Contract to Support Third Person.—Where a certain sum of money was paid to a husband and wife, and in consideration thereof they covenanted to support and maintain one X. during the remainder of her natural life. *Held*, that the wife's interest in the sum so paid is her separate estate, and she is liable upon the covenant as well as her husband: *Houghton v. Milburn*, 54 Wis.

INJUNCTION.

Foreclosure Sale—Embarrassed Title—Execution against Party not Holding Title.—A mortgagor who mortgages an embarrassed title, or whose title has subsequently become clouded, cannot, in the absence of fraud, have the foreclosure proceedings stayed on account of an apprehension that the mortgaged premises will not bring full value at a foreclosure sale. His remedy is by redemption: *Am. Dock and Imp. Co. v. Trustees of Public Schools*, 35 N. J. Eq.

A court of equity will ordinarily not interfere to enjoin a sale of lands under an execution against one person, the title to which is claimed by another, for the reason that such a sale will not prejudice the rights of the latter. To warrant resort to the restraining power of the court, the case must present some recognised ground for equitable relief—fraud or irreparable injury: *Id.*

INSURANCE.

Misrepresentation—Temperate Habits—Occasional Excess.—An application for a policy contained the following question: "Is the party of temperate habits? Has he always been so?" The answer was, "Yes." In a suit on the policy the company proved that during the year previous to taking the policy the insured had been once treated for delirium tremens. There was counter evidence as to his temperate habits. The court charged that if the habits of the insured in the usual ordinary and every day routine of his life were temperate, the representation was not untrue within the meaning of the policy, although he might have had an attack of delirium tremens from an exceptional over indulgence. *Held*, not to be error: *Knickerbocker Life Ins. Co. v. Foley*, S. C. U. S., Oct. Term 1881.

Stipulation against other Insurance—Effect of such other Insurance.—Where there are two policies of fire insurance on the same property, each containing the condition that if the assured shall have, or shall thereafter make, any other insurance on the property, without the consent of the company written thereon, then the policy shall be void, the second policy, without such consent, does not invalidate the first, for it never effected an insurance: *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq.

Although there is a second policy, there is no fraud in the statement, in proof of loss, that there is no other insurance, if the second policy was never valid: *Id.*

Mutual Benefit Company—Corporation not for Profit—Provision for Payment of Loss to other Persons than Family of Insured.—A corporation for the mutual protection and relief of its members, and for the payment of stipulated sums to the family or heirs of deceased members, belongs to the class of corporations formed for purposes other than for profit: *Ohio v. Standard Life Association*, 37 or 38 Ohio St.

A certificate of membership in such a corporation by which the corporation in consideration of the payment by the member of a membership fee, annual dues and a pro rata assessment with his fellow members to pay a sum of money to the family or heirs of a deceased member, stipulates to pay at his death to his family or heirs a sum of money, graduated by the number of members in his class, is a contract of life insurance: *Id.*

Such a contract of insurance to pay in case of a member's death "to himself or assignees," "to his estate," "to his executors or administrator," or to any person, whether a relation or not, who is not of his family or heirs, is against public policy, and void: *Id.*

JUDGMENT.

Mandamus Proceeding—Lot Owner.—The owner of a city lot, not being made a party to a proceeding by mandamus to compel the common council of the city to levy a special tax or assessment thereon, is not bound by the judgment in such proceeding: *Rork v. Smith*, 54 Wis.

Power to Change—Costs.—This court has no power to modify its own judgment as to costs, rendered at a former term, as by changing it from a judgment against the plaintiff (who brought the suit in his official capacity upon an assignee's bond) to a judgment against the person for whose benefit the suit was brought: *Boland v. Benson*, 54 Wis.

JUROR. See *Criminal Law*.

LEGACY. See *Tax*.

LIEN. See *Bailment*.

LIMITATIONS, STATUTE OF.

What Acknowledgment sufficient to revive Debt.—To take a case out of the operation of the Statute of Limitations it is not essentially necessary that the promise to pay should be actual or express. A clear, distinct and unequivocal acknowledgment of a debt is sufficient. It must be an admission consistent with a promise to pay. If so the law will imply the promise without its having been actually made: *Palmer v. Gillespie*, 95 Penn. St.

There must be no uncertainty as to the particular debt. It must be so distinct and unambiguous as to remove hesitation in regard to the debtor's meaning: *Id.*

MANDAMUS. See *Judgment*.

County Treasurer—Taxes Due State.—Proceedings by mandamus, on the relation of the treasurer of state, will lie to compel the treasurer of a county to transfer to the state treasury the state's proportion of taxes collected by such county treasurer: *Ohio v. Staley*, 37 or 38 Ohio St.

A petition for a writ of mandamus in such case, which shows the collection of such taxes by the county treasurer, is not defective for want of an averment that the taxes so collected remain in the county treasury subject to the command of the writ: *Id.*

MORTGAGE.

Acceptance of Collateral—Effect of.—The giving of a bond as collateral security to a subsisting bond and mortgage, does not, *per se*, and in the absence of any ancillary agreement, operate as a suspension of the right to prosecute such bond and mortgage: *Firemen's Ins. Co. v. Wilkinson*, 35 N. J. Eq.

A surety of the mortgagor will not be released by the mere giving of such collateral bond: *Id.*

Statutory Right of Redemption—Sale of Property—Bill to Redeem when too Late.—After the statutory period for redemption of property sold under foreclosure proceedings has expired without any offer on the part of defendant to redeem, he cannot maintain a bill to redeem on the ground that in decreeing the sale of the property the court failed to secure to him such statutory right of redemption: *Burley v. Flint*, S. C. U. S., Oct. Term 1881.

MUNICIPAL BONDS.

Bonds of Precincts—Suit against County—Jurisdiction of Federal Courts.—A state statute authorized precincts of counties to vote for the issue of bonds in aid of internal improvement, and provided that upon such vote the county commissioners should issue special bonds for such precinct and levy a special tax to pay the interest and principal thereof upon the property within the bounds of such precinct. *Held*, that suit upon such bonds should be brought against the county and not against the precinct. *Held further*, that it was no defence to an action at law upon such bonds in a federal court that the state statute had provided a remedy by mandamus: *Davenport v. County of Dodge*, S. C. U. S., Oct. Term 1881.

MUNICIPAL CORPORATION.

Liability for Injury to Property in Grading Street.—A municipal corporation in making a street along a hillside so excavated the ground in the street as to cause the land above to slide and injure the lot of the plaintiff. *Held*, that the fact that the plaintiff's lot did not abut immediately on the street did not exempt the corporation from liability. Its liability did not depend upon the ownership of the injured property, but upon the extent of the injury of which its removal of the lateral support of the hill was the efficient cause: *Keating v. City of Cincinnati*, 37 or 38 Ohio St.

In such case the liability extends to damages to buildings as well as to the land in its natural state, where the owner is not chargeable with negligence in making such improvements, and such damages result from want of due skill and care in making the street: *Id.*

NEGLIGENCE.

Railroad—Trespasser—Injury to Child.—Except at public crossings, where the public has a right of way, a railroad company has the exclusive right to its track, and it owes no duty to the father of a child of tender years trespassing thereon, nor to the child itself: *Cauley v. Pittsburgh, Cincinnati and St. Louis Railway Co.*, 95 Penn. St.

Parents who permit their children to trespass upon a railroad track are guilty of contributory negligence, and the fact that the trespass was without the knowledge of the parents is not material: *Id.*

NUISANCE.

Erection in Street—Liberty Pole.—Any unreasonable obstruction of a highway is a public nuisance for which an indictment will lie. It is not, however, every obstruction in the highway that constitutes a nuisance *per se*. When it is not, and whether a particular use is an

unreasonable use and a nuisance, is a question of fact to be submitted to a jury: *City of Allegheny v. Zimmerman*, 95 Penn. St.

The right to partially obstruct a street is not limited to a case of strict necessity; it may be extended to purposes of convenience or ornament provided it does not unreasonably interfere with public travel: *Id.*

The erection of "liberty poles" is a custom sanctioned by a hundred years and interwoven with the traditions, memories and conceded rights of a free people, and unless forbidden by the authorities, has been considered the exercise of a lawful license incident to citizenship: *Id.*

If it had been a uniform custom for the people to erect such poles in the streets of a city from its earliest history, under the implied assent of the municipal authorities, and if the one in question was carefully erected, having due regard to the material of which it was formed, and the manner in which it was secured, so that a careful and prudent person would have apprehended no danger therefrom, it was not a nuisance *per se*: *Id.*

PARENT AND CHILD. See *Negligence*.

PATENT.

Improvement—Infringement—Measure of Damages.—In estimating the profits for which an infringer of a patented improvement to a machine is liable, the principle to be applied is, that if the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, the infringer has, by his infringement, secured the advantage of a market he would not otherwise have had, and the fruits of this advantage, for which he is liable, are the entire profits he has made in that market: *Goulds Manuf. Co. v. Cowing*, S. C. U. S., Oct. Term 1881.

In such case it is error to restrict the infringer's liability to such profits as were realized from the manufacture of the patented improvement as distinguished from the profits realized from the whole machine as improved: *Id.*

RAILROAD. See *Negligence*.

RECEIVER. See *Conflict of Laws*.

SLANDER.

Damages—Effect of Evidence as to Character.—In an action of slander the court charged the jury to consider "all the evidence on both sides touching the moral character of the plaintiff," but did not definitely state what effect, if any, such character should have in determining the amount of damages; and it refused to charge that in actions for slander "a person of bad character is not entitled to the same measure of damages as one of good character;" that if plaintiff's "general character" was bad, that fact must be considered in determining the damages; and that the jury were at liberty to find only nominal damages. *Held*, that such refusal was error: *Campbell v. Campbell*, 54 Wis.

SPECIFIC PERFORMANCE. See *Corporation*.

Parol Contract—Part Performance.—Where the negotiations have been conducted by parol, or are partly evidenced by writings duly

signed and partly rest in parol, and specific performance is sought on the ground of part performance, the terms of the contract must appear clearly, definitely and unequivocally. But it is sufficient that the terms of the contract be made out in a manner satisfactory to the court. The fact that the details of the agreement are controverted by the parties will not deter the court from ascertaining what the terms of it really were and giving effect to the agreement, if the complainant shows himself entitled to a specific performance, by a part performance, which shall be referable only to a part execution of the agreement: *Wharton v. Stoutenburgh*, 35 N. J. Eq.

Delivery of possession by a vendor or lessor, accepted and acted upon by the vendee or lessee, is such an act of part performance by the former as to take the contract out of the Statute of Frauds, and to justify a decree of specific performance against the latter: *Id.*

Courts of equity will refuse to exercise jurisdiction by way of specific performance in a class of special and exceptional contracts, where the terms and provisions are such that the court could not carry its decree into effect without exercising some personal supervision and oversight over the work to be done, extending over a considerable period of time, such as agreements to repair or build, to construct works, build or carry on railways, mines, and the like. A contract for a lease of mines, to be worked in a specified manner, is not within this principle. The court, in such cases, can grant relief at once by a decree that the lease be executed, leaving the complainant to his legal remedy thereafter for breaches of the covenants contained in it: *Id.*

STATUTE. See *Constitutional Law*.

SURETY. See *Mortgage*.

TAX.

Legacy Tax—Property in Remainder.—Under the provisions of the Act of Congress of July 14th 1870, repealing the legacy tax, personal property bequeathed to remaindermen after a life estate to testator's widow, prior to the passage of the act, but not vesting in possession through the death of the life-tenant until after the passage of the act, is not liable to the tax: *Mason v. Sargent*, S. C. U. S., Oct. Term 1881.

Claim for Deduction—When Demand of not Necessary—Relief in Equity.—Where it is reasonably certain, from the previous action and the declared intention of a tax-collector, that a demand for a reduction based upon a certain construction of a statute will be refused, such demand is not essential to enable the tax-payer to maintain a bill for relief against the collection of the tax without allowing the appeal: *Hill v. Nat. Albany Exch. Bank*, S. C. U. S., Oct. Term 1881.

TENDER. See *Tax*.

WHARF. See *Corporation*.

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THE RIGHT TO COUNSEL IN A CRIMINAL CASE.

THE sixth amendment to the Constitution of the United States provides, among other things, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, * * * and to have the assistance of counsel for his defence."

The ninth section of the first article of the Constitution of Pennsylvania declares that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel." Provisions identical in language or in substance with one or the other of these quotations are to be found in the Constitution of every state in the Union, with the exception of Virginia.

It is our purpose to examine this right, to trace the history of its establishment, and define its boundaries. The subject is one of unusual interest, and appeals not only to the professional man but to every intelligent layman who values his rights as a citizen and seeks to fully understand them. The claim of Guiteau, recently on trial for the murder of President Garfield, though represented by counsel, to act as his own counsel, and his extraordinary behavior in the assertion and exercise of his right, awakened a wide spread public interest in the topic and led to many inquiries concerning it. It is not too late to discuss it.

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The rule, briefly stated, is as follows: At common law, in all cases, whether of treason, felony or misdemeanor, and at all times, the prisoner has had and still has the right to address the jury in person in his own defence. In misdemeanors he always was and still is allowed to do this by counsel; but it is universally agreed that at common law a prisoner, whether peer or commoner, was not entitled to defend by counsel, upon the general issue "not guilty" on any indictment for treason or felony: 1 Archbold's *Crim. Prac. and Pl.*, Pomeroy's ed., 551; Weeks on Attorneys at Law, sect. 184; 1 Chitty's *Crim. Law* *407; Hawkins's *P. C.*, b. 2, c. 39, sect. 1; Foster's *Crown Law* 231; Hale's *P. C.* 236.

There were certain well-established exceptions. In appeals, which were private rather than public prosecutions, being the accusation of a murderer by one who had an interest in the person killed, or of a felon by one of his accomplices, full counsel were always allowed to the appellee, because although the object sought was the death of the defendant, yet the form was that of a civil proceeding, and all appeals were presumed to be carried on with greater spleen and vindictiveness than indictments: 2 Hawkins, c. 39, sect. 3; 1 Chitty *Crim. Law* *410; 17 *State Trials* (Howell's ed.) 430; 8 *Id.* 726.

The prohibition of the assistance of counsel applied only to *matters of fact*, as the court assigned counsel to argue a doubtful point of law arising at or after trial (Hale's *P. C.* *236); and upon the trial of issues which did not turn on the question of "guilty" or "not guilty," but upon collateral facts, as a plea of sanctuary or a pardon, or upon the assignment of error to reverse a sentence of outlawry, prisoners under capital charges, whether of treason or felony, were entitled to the assistance of counsel: Foster's *Crown Law*, pp. 42, 46, 56, 232; *Ratcliff's Case*, 4 *State Trials* 47.

But these exceptions were of little practical benefit to those ignorant of law, for it was held in all cases that the prisoner must propose the point, and if the court think it will bear a debate they will assign counsel to argue it: 2 Hawkins, c. 39, sect. 4; 7 *State Tr.* 1523; 8 *Id.* 570; 11 *Id.* 525. At the trial of Lord Preston in 1691, Chief Baron ATKYNS said: "It is not the doubt of the prisoner but the doubt of the court that will occasion the assignment of counsel:" 12 *State Trials* 659, 660.

Upon the trial of Thomas Howard, Duke of Norfolk, in 1571, for treason in supporting the right of Mary Queen of Scots to the

British throne, he made a vain appeal to the court for counsel even upon questions of law: 1 State Trials 965. "I have," he said, "had very short warning to provide answer to so great a matter. I have not had fourteen hours in all both day and night; and now I neither hear the same statute alleged, and yet I am put at once to the whole herd of laws, not knowing which particularly to answer unto. The indictment containeth sundry points and matters to touch me by circumstance, and so to draw me into the matter of treason which are not treasons themselves; therefore with reverence and humble submission I am led to think I may have counsel, and this I show, that you may think I move not this suit without any ground. I am hardly handled. I have had short warning and no books." Chief Justice DYER refused the request by answering that counsel could not be allowed in point of treason.

Sir Henry Vane, on his trial for high treason, raised most important questions of law, and prayed to have counsel assigned to speak to them. The application was refused on the ground that the same points had been decided on the trials of the regicides: 6 State Trials 183, A. D. 1662.

During the trial of Sidney application was made by him for counsel when he contended that conspiracy to levy war was not treason, and when he objected that some of the jury were not freeholders of the county in which the venue of the indictment was laid, and he was answered by Chief Justice JEFFREYS "If you assign us any particular point of law, if the court *think it such a point as may be worth the debating*, you shall have counsel:" 9 State Trials 834. When Bamfield rose as *amicus curiæ* and suggested in arrest of judgment that there was a material defect in the indictment, JEFFREYS coolly observed, "We have heard of it already, we thank you for your friendship and are satisfied." He then sentenced the illustrious prisoner to death. On the trial of Colledge, Lord Chief Justice NORTH declared, "I must tell you a defence in case of high treason ought not to be made by artificial cavils but by plain fact:" 8 State Trials 570.

The judges in the time of the Commonwealth were no less arbitrary. Their behavior towards John Lilburne on his trial as a traitor for publishing criticisms upon the government of Cromwell, was more decorous in tone but none the less severe than that of Foster or Scroggs. Time and again he besought the appointment

of counsel, and was always refused. Then bursting out with long suppressed passion he cried: "Pray let me have fair play, and not be wound and screwed up into hazards and snares." With a courage unequalled by his bravest deeds in battle, he declared: "In so extraordinary a case for me to be denied to consult with counsel, I tell you, sir, it is most unjust and the most unrighteous thing in my apprehension that I ever heard or saw in all my life. O Lord! was there ever such a pack of unjust and unrighteous judges in the world. * * * I would rather have died in this very court before I would have pleaded one word unto you, for now you go about by my own ignorance and folly to make myself guilty of taking away my own life, and therefore unless you will permit me counsel, upon this lock I am resolved to die:" 4 State Trials 1299. His appeal was fruitless.

An apology for this harsh feature of the rule was offered in the maxim that the judge was counsel for the prisoner; that it was his duty to see that the proceedings were regular, to examine witnesses for the defendant, to advise him for his benefit, to hear his defence with patience, and in general to take care that he was neither irregularly nor unjustly convicted. In prosecutions where counsel were allowed, the court did not advise the prisoner. The maxim was benevolent, but few judges ever gave the slightest heed to it in practice.

One or two instances must suffice for illustration. Upon the trial of Penn and Mead at the Old Bailey, for preaching to a seditious and tumultuous assembly, the recorder put the following question:

"What say you, Mr. Mead—were you there?"

MEAD: "It is a maxim of law that no one is bound to accuse himself, and why dost thou offer to insnare me with such a question? Doth not this show thy malice? Is this like unto a judge that ought to be counsel for the prisoner at the bar?"

REC.: "Sir, hold your tongue, I did not go about to insnare you?" 6 State Trials 958.

Upon the trial of John Crook, and other Quakers, for refusing to take the oaths of allegiance, the following spirited dialogue is reported:

FOSTER, C. J.: "John Crook, when did you take the oath of allegiance?"

CROOK: "Answering this question in the negative is to accuse

myself, which you ought not to put me upon. '*Nemo debet seipsum prodere.*' I am an Englishman and I ought not to be taken, nor imprisoned, nor called in question, nor put to answer but according to the law of the land."

FOSTER, C. J.: "You are here required to take the oath of allegiance, and when you have done that, you shall be heard."

CROOK: "You, that are judges on the bench, ought to be my counsel, not my accusers."

FOSTER, C. J.: "We are here to do justice, and we are upon our oaths to tell you what is law, not you us. Therefore, sirrah, you are too bold."

CROOK: "Sirrah is not a word becoming a judge. If I speak loud, it is my zeal for the truth, and for the name of the Lord. Mine innocency makes me bold."

FOSTER, C. J.: "It is an evil zeal."

The chief justice then ordered the mouth of the prisoner to be gagged with a "dirty cloth:" 6 State Trials 119.

The grossest violation of the maxim was the behavior of JEFFREYS upon the trial of Lady Alice Lisle. She was more than seventy years of age and a widow, and had given food and shelter to a dissenting clergyman named Hicks, who had been with the army of Monmouth. The indictment charged her with treason. There was no proof whatever that she knew that the man she harbored had ever been with the rebel army; and the jury declared that they were not satisfied upon this point, which was the only important one in the case. The judge usurped the functions of the counsel for the Crown and pressed a reluctant and conscientious witness so hard as to "clutter him out of his senses." Blasphemy, ribaldry and the most horrid jests and imprecations were showered upon him in the effort to induce him to say something that would convict the prisoner. Finally, JEFFREYS extorted a verdict by arbitrarily declaring "there is as full proof as proof can be:" 11 State Trials 322. He then sentenced the unhappy lady to be burned to death, but she escaped the terrible fate of Elizabeth Gaunt, by a commutation of the sentence into death by hanging. Upon the scaffold she spoke these words: "I have been told the court ought to be counsel for the prisoner; instead of which there was evidence given from thence which, though it were but hearsay, might possibly affect my jury. My defence was such as might be expected from a weak woman; but such as it was I did not hear it

repeated to the jury. But I forgive all persons that have done me wrong, and I desire that God will do so likewise."

The rule and the practice under it had their admirers. *Ld. COKE* declared that the reason of its adoption was because the evidence by which the prisoner was to be condemned ought to be so very evident, and so plain, that all the counsel in the world should not be able to answer it: 3 Inst. 137. *Sir John Davys* declared that our law doth abhor the defence and maintenance of bad causes more than any other law in the world: Preface to *Davy's Rep.* *Sergeant Hawkins* asserted "if it be considered that generally every one of common understanding may as properly speak to a matter of fact as if he were the best lawyer, and that it requires no manner of skill to make a plain and honest defence, which in cases of this kind is always the best, the simplicity and innocence, artless and ingenuous behavior of one whose conscience acquits him, having something in it more moving and convincing than the highest eloquence of persons speaking in a cause not their own." 2 Hawkins, c. 39, sect. 2.

The rule did not pass unchallenged. The seeds of its dissolution, though slow in development, had been early sown. As far back as the reign of *Edward II.*, the author of the *Mirror of Justices* had declared that counsel learned in the law "were more necessary for the defence of indictments and appeals of felony than upon other venial causes." The venerable *Whitelocke* assailed it in debate; *Sir ROBERT ATKYNS* declared it a severity, and significantly said that he knew from experience what the maxim meant that the judge was counsel for the prisoner. Even *JEFFREYS* declared that it was an injustice that a man should have counsel to defend a two-penny trespass, but that in defence of life he should have none. (See the very learned note to 5 State Trials 469.) The *Bloody Assizes* aroused the sleeping sense of justice of the nation, and in ten years after, the Bill for regulating Trials in Cases of High Treason was brought forward in the House of Commons early in February of 1695. After much opposition it became a law, known as the 7th Wm. III., c. 3. The act, among other things, gave to a prisoner charged with high treason "the assistance of counsel, not exceeding two, throughout his trial, to examine his witnesses and to conduct his whole defence as well in point of fact as upon questions of law."

Many wiseacres predicted the ruin of the state. *Bishop Burnet*,

after stating that the bill had passed contrary to the hopes of those then at the head of affairs, said, "the design of it seemed to be to make men as safe in all treasonable practices as possible." The judges too were the avowed enemies of the change.

The act was to go into effect on the 25th of March 1696. On the 24th of March, Sir William Parkyns, a wealthy knight, bred to the law, was put upon his trial for having been concerned with Charnock, Porter, Goodman and Fenwick in a Jacobite plot to assassinate the king. He prayed that counsel might be allowed him, and cited the preamble of the statute as declaring that such a demand was reasonable and just. Lord HOLT replied: "God forbid that we should anticipate the operation of an Act of Parliament even by a single day:" 13 State Trials 72. Parkyns then asked that the trial be postponed; but his application was refused and the unlucky man was actually convicted and executed six hours before the bill went into effect.

It was a long time, however, before counsel were bold enough to defend their clients with spirit, and it remained for Dunning and the never to be daunted Erskine to establish the rights of the bar.

The first instance on record of the assignment of counsel under the act is on the trial of Rookwood and others for having been concerned in the same conspiracy as Parkyns. Sir Bartholomew Shower was assigned as counsel. "My Lord," said he, addressing Chief Justice HOLT, "we are assigned of counsel in pursuance of an act of Parliament, and we hope that nothing which we shall say in defence of our clients shall be imputed to ourselves. * * * We come not here to countenance the practices for which the prisoners stand accused, nor the principles upon which such practices may be presumed to be founded; for we know of none, either religious or civil, that can warrant or excuse them." Lord HOLT administered a very proper rebuke. 13 State Trials 154.

In strong contrast with this abject apology is the splendid bearing of Erskine on the trial of Paine: "I will for ever—at all hazards—assert the dignity, independence and integrity of the English bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he *will* or *will not* stand between the crown and the subject arraigned in the court where he daily sits to practice, from that moment, the liberties of England are at an end."

Impeachments had been expressly excepted from the Statute of William, and, therefore, counsel were denied to Lords Winton and Lovat, the latter of whom, broken by the weight of eighty years, was too feeble to struggle even for his life. It is significant that Sir William Yonge, who was the leading manager of their impeachment, introduced into the House of Commons the bill that in 1747 became known as 20th Geo. II., correcting this abuse. It was not until 1836 that the last remnants of this barbarism were swept away. The 6 & 7 Wm. IV., c. 114, enacted that all persons tried for felony should be admitted to make their defence by counsel or attorney.

As the law now stands, the prisoner, for whatever crime indicted, is entitled to the full assistance of counsel upon every question of fact and law, to visit him in prison, to advise him in court, to cross-examine the opposing witnesses, to examine in chief those produced for the defence, and to address the jury. The only remaining question is, how far does the representation by counsel supplant the prisoner's ancient right to act in person?

It was early held in England that a man could be heard by himself or his counsel, but not by both. The point was raised upon the trial of Mr. Redhead Yorke, in 1795, for a misdemeanor: 25 State Trials 1021. At the close of the opening by the counsel for the prosecution, Mr. Yorke applied to Justice ROOKE to learn whether both himself and his counsel might address the jury. He was informed that both could not, and that he must make his election. Mr. Yorke then applied to be permitted, when his counsel examined the witnesses, to examine them himself also. This was refused. Mr. Yorke and his counsel then alternately cross-examined. Then at the close of the prosecution the court asked the prisoner whether he had elected to address the jury or to leave it to his counsel. He elected to do it in person, and his counsel and himself alternately examined the witnesses for the defence.

In 1811, Lord ELLENBOROUGH, in the case of *Rex v. White*, 3 Camp. N. P. 98, still further restricted the practice. His language is so clear and sensible as to deserve quotation: "I am afraid of the confusion and perplexity that would arise if a cause were to be conducted at the same time both by counsel and the party himself. I am extremely anxious that a person accused should have every assistance in making his defence, but I must likewise look to the decent and orderly administration of justice.

I therefore cannot allow counsel to examine witnesses for the defendant if he is likewise to put questions to them himself and afterwards to address the jury. If, in the course of the trial, any point of law arises which he declares himself incompetent to discuss, I will be very ready to hear it argued by his counsel, although he conducts the defence himself. I will do in this respect as was formerly done in capital cases when the assistance of counsel was not permitted to prisoners upon matters of fact. I think I cannot consistently with my duty go further; and surely there is no hardship in the rule I lay down. If the defendant has counsel to conduct his cause, he may suggest any question to them which he considers fit to be put, or if he takes the conduct of it upon himself he may have the benefit of their private suggestions upon matters of fact; and as soon as any point of law arises they shall be readily heard upon it."

Both of these cases were cited in argument before Lord Chief Justice ABBOTT on the trial of one Parkins for a misdemeanor; he held that a prisoner cannot have counsel to examine and cross-examine witnesses and reserve to himself the right to address the jury: *Rex v. Parkins*, Ryan & Moody N. P. C. 168.

An examination of the later decisions shows an occasional departure, under very special circumstances, from the rulings just quoted, but the undoubted weight of authority is in favor of the rule, which very eminent judges have repeatedly enforced, that a prisoner is in the hands of his counsel for every purpose, if he see fit to employ counsel; but so tender is the law about infringements of ancient rights that on a murder trial of a foreigner who had obstinately remained mute from malice for more than a year, the court refused to allow counsel to appear for the prisoner without his express consent: *Regina v. Yscuado*, 6 Cox C. C. 386.

In the following cases the rule was enforced: *Reg. v. Manzano*, 2 Foster & F. 64; s. c. 6 Jur. N. S. 406; *Reg. v. Taylor*, 1 Foster & F. 535; *Reg. v. Boucher*, 8 C. & P. 141; *Reg. v. Burrows*, 2 M. & Rob. 124; *Reg. v. Walking*, 8 C. & P. 243; *Reg. v. Rider*, 8 Id. 539; *Reg. v. Teste*, 4 Jur. N. S. 244.

In the following cases the rule was relaxed: *Reg. v. Stephens*, 11 Cox C. C. 669; *Reg. v. Dyer*, 1 Id. 113; *Reg. v. Malings*, 8 C. & P. 242; *Queen v. Williams*, 1 Cox C. C. 363.

We now turn to the United States, and must go back in point of time. The materials to furnish an accurate judgment of the

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practice in the colonies prior to the Revolution are few and unsatisfactory. The colonial charters and patents are silent as to any change, real or proposed, of the law of the mother country, but among the laws agreed upon in England between William Penn and "divers free men of the Province" of Pennsylvania, the sixth article provided that "in all courts all persons of all persuasions may freely appear in their own way and according to their own manner, and there personally plead their own cause themselves, or, if unable, by their friend." Admonished, no doubt, by his own sufferings, the liberal and benevolent Proprietary, in the Charter of Privileges granted by him in 1701, with the approbation of the General Assembly, declared, "that all criminals shall have the same privileges of witnesses and counsel as their prosecutors." The records of the Provincial Council show that those accused of crime both defended themselves and were defended by counsel; but we can only conjecture how the practice changed in the other colonies.

In 1718, at Charleston, in South Carolina, Major Stede Bonnet and thirty-three others were tried in the Vice Admiralty Court for piracy: 15 State Trials 1231. The prisoners had no counsel, and the behavior of Chief Justice Trott is a sad instance of judicial barbarity. The statements of the prisoners in one case, to which no credit was given for their exculpation, were used as hearsay evidence in another case to convict the prisoner.

In 1732 John Peter Zenger was tried in New York for libel, and was defended with great boldness by Andrew Hamilton of Philadelphia, the most eloquent and renowned lawyer of his day. The case is no guide for us, however, as libel is graded as a misdemeanor.

In 1770, Josiah Quincy, Jr., and John Adams defended, for the murder of Attucks, Gray and others, the soldiers who had fired upon the mob in the streets of Boston on the evening of the 5th of March. These and the cases of the Salem witches are the only trials of note that our meagre colonial records afford.

The example set by Penn and the sufferings of the English at home, full of instructive warning to those who sought to guard against governmental tyranny by constitutional provisions, are sufficient to account for the presence in the earliest state Constitutions of a clause extending to one accused of crime the protection of a defence by counsel.

Pennsylvania and Maryland so provided in 1776 ; New York in the following year ; Massachusetts in 1780, and Delaware in 1792. In September 1787, the convention called to frame the Constitution of the United States completed their work, and submitted it to the people for adoption. The original instrument contained no Bill of Rights and no reference to our subject. At the end of July 1788, eleven states had unconditionally adopted the Constitution, but five of them proposed amendments for the consideration of the first Congress that would assemble under it, and one of the five called for a second general convention to act upon the amendments desired. North Carolina and Rhode Island did not adopt the Constitution until the administration of Washington had fairly begun, and by the 15th of December 1791, amendments were duly proposed by Congress and ratified by the legislatures of the several states. The sixth amendment, to which alone we need refer, has been partly quoted at the head of this article. To carry it into effect Congress provided "that in all courts of the United States the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein:" and further, at a later date, "every person * * * indicted for treason or other capital offence shall be allowed to make his full defence by counsel learned in the law:" Rev. Stat. U. S. sects. 747, 1034. This language and that of the amendment to the Constitution have never received judicial construction. The practice, we believe, has been in conformity with the English rule, until the recent trial of Guiteau. It is a singular fact that the question has never been raised in any of the states, except in a late case in Tennessee, which we shall presently notice.

In Mississippi, South Carolina and Texas, the language of the constitutional clauses is too explicit to admit of doubt ; it gives the right "to be heard by himself or counsel, or both, as he may elect." In Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Kentucky, Missouri, New Hampshire, Ohio, Oregon, Pennsylvania, Tennessee, Vermont and Wisconsin, the language is "by himself *and* his counsel." In Kansas, Louisiana and Nebraska, it is "in person *or* by counsel." In Alabama and Maine, it is "by himself *and* his counsel or either at his election." In Massachusetts he "shall be fully heard by himself *or* counsel, at his election." In California, Florida, Nevada and New York, he is "to appear and defend in per-

son *and* with counsel as in civil actions." In Georgia he "shall have the privilege and benefit of counsel." In Iowa, Michigan, Minnesota, New Jersey, North Carolina, Rhode Island and West Virginia, "he shall have the assistance of counsel in his defence." In Maryland it is declared that "he ought to be allowed counsel." In Virginia there is no constitutional provision, but a statute of 1786 and well-settled practice establish the right.

Upon most of these clauses there is room for ingenuity of argument, but the almost total absence of judicial decisions is strong evidence of the sensible determination of criminals to commit their defences exclusively to professional hands. The only case revealed by a diligent search is that of *Wilson v. The State*, in Tennessee, 3 Heisk. 232. Counsel had fully agreed upon the evidence, and then the prisoner himself claimed the right to make a statement. This was denied. The Court of Errors and Appeals held that the right given by the Constitution, though in the words "to be heard by himself *and* his counsel," simply meant the right to argue the case upon the facts in evidence, and did not include a sworn or unsworn statement of facts not otherwise proved. Judge NELSON dissented on the ground that this was a denial of right. It may, therefore, be fairly said that the question is still open to debate.

The limitations put upon the rights of advocates, and, by parity of reasoning, upon those who claim to act as their own advocates, are such as grow out of the powers of a court to so superintend the proceedings as to prevent a waste of time or breach of decorum. But while insisting upon the existence of these powers, judges have universally displayed the utmost reluctance to exercise them. The right to "try men by the hour-glass" is declared dangerous in the extreme: *Hunt v. The State of Georgia*, 49 Geo. 255; *People v. Keenan*, 13 Cal. 581; *Cooley's Const. Lim.* 336; *State v. Collins*, 70 N. C. 241; *Word's Case*, 3 Leigh (Va.) 743; *Commonwealth v. Porter*, 10 Met. 263; *Lynch v. State*, 9 Ind. 541.

Other difficulties may arise, as recent experience has shown, from the rule that in cases of felony the record must show that the prisoner was personally present during every stage of the trial: *Prine v. The Commonwealth*, 6 Harris 103. This rule is not enforced in cases of misdemeanor: *United States v. Davis*, 6 Blatch. C. C. R. 464.

HAMPTON L. CARSON.

RECENT ENGLISH DECISIONS.

High Court of Justice. Queen's Bench Division.

GODDARD v. O'BRIEN.

Payment of a check for 100*l.* payable on demand and duly honored, given and accepted in settlement of a debt of 125*l.*, is a good accord and satisfaction as to the whole debt.

Cumber v. Wane, 1 Str. 426, commented on.

THIS was a special case stated by Mr. STONOR, Judge of the Southwark county court, as follows:

The plaintiffs are billiard and bagatelle slate manufacturers, of Vine street, York Road, S. W., and the defendant is a billiard table maker carrying on business at Manchester.

The action is brought to recover the sum of 42*l.* 2*s.* 9*d.* for goods sold and delivered, made up as follows: 25*l.* 7*s.* 9*d.*, balance of account for goods sold and delivered between the 6th of May 1879, and the 26th of April 1880; 5*s.*, extra charge on delivery of goods already paid for; and the balance of 18*l.* 10*s.*, for goods manufactured by the plaintiffs for the defendant in the year 1881.

I found for the defendant in respect of the second and third items of claim for 5*s.* and 18*l.* 10*s.* respectively, and the plaintiffs are not desirous of appealing from my judgment in respect of either of these two amounts.

On the 16th of August 1880, the defendant was indebted to the plaintiffs in the sum of 125*l.* 7*s.* 9*d.* for slates for billiard tables sold and delivered by them to him, which sum was then due and payable. On that day Mr. Newill, a member of the plaintiffs' firm, met the defendant, and agreed to accept the sum of 100*l.* in discharge of the said sum of 125*l.* 7*s.* 9*d.* The defendant thereupon gave to the plaintiffs a check for 100*l.*, payable on demand, and the plaintiffs gave him a receipt in the following form

“Received the sum of 100*l.* by check, which is to be in settlement of an account of 125*l.* 7*s.* 9*d.* on said check being honored.
August 16th 1880. GODDARD & SON.”

The check was duly honored. There was no consideration given by the defendant or received by the plaintiffs in satisfaction of the said sum of 125*l.* 7*s.* 9*d.*, other than the said check for 100*l.*

This action was tried before me on the 2d of December 1881, and I gave judgment on the 12th of January 1882, for the defendant,

and held that the payment to and acceptance by the plaintiffs of the check for 100*l.* in settlement of their claim of 125*l.* 7*s.* 9*d.* was a good accord and satisfaction by reason of the check being a negotiable security, although the payment of 100*l.* in cash would not have been a good accord and satisfaction.

The plaintiffs allege that they were induced to agree to accept the sum of 100*l.* in discharge of their debt of 125*l.* 7*s.* 9*d.* by certain representations made to them by the defendant, which subsequently proved to be false, but I found that no such representations had been made.

The questions submitted for the opinion of the court are:—

1. Whether the payment by the defendant to the plaintiffs of the check for 100*l.* in settlement of the debt of 125*l.* 7*s.* 9*d.* was a good accord and satisfaction of the whole of the plaintiffs' debt.

2. Whether the plaintiffs are entitled to judgment for the said sum of 125*l.* 7*s.* 9*d.*

Brown, for the appellants.—The question is whether a payment by a check for 100*l.* is good accord and satisfaction for a debt of 125*l.* and I rely on *Cumber v. Wane*, 1 Str. 426, 1 Sm. Lead. Cas., 7th ed., p. 591.

Woodward, for the respondent, was not called upon.

GROVE, J.—I am of opinion that the county court judge was right in his decision. No doubt the difficulty in this and similar cases arises from the decision in *Cumber v. Wane*, which is entitled to all respect, although we may not perceive the reasoning on which the decision is founded. *Cumber v. Wane* has, however, been much qualified by the case of *Sibree v. Tripp*, 15 M. & W. 23, and the only way in which *Cumber v. Wane* appears to have been kept alive is by the court saying that it did not appear in that case that the note was a negotiable one. In the present case the payment was by a check which is a negotiable instrument, and *Sibree v. Tripp* is a direct authority for saying that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount.

I admit I cannot follow the reasoning of *Cumber v. Wane*, or why the argument that applies to negotiable instruments should not equally apply to money.

HUDDLESTON, B.—I am of the same opinion, and on the grounds on which the county court judge has decided, viz., that this payment was a good accord and satisfaction by reason of the check being a negotiable instrument.

The doctrine of *Cumber v. Wane* is, no doubt, very much qualified by *Sibree v. Tripp*, and I cannot find that better stated than in 1 Sm. Lead. Cas., 7th ed., p. 595: "The general doctrine in *Cumber v. Wane*, and the reason of all the exceptions and distinctions which have been engrafted upon it may, perhaps, be summed up as follows, viz., that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*, but if there be any benefit, or even legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement."

Appeal dismissed with costs.

Few legal propositions strike a business man with more surprise than this, that a creditor is not bound by his fair and explicit agreement to accept part of his debt in full satisfaction of the whole, and that he may, notwithstanding such agreement, and its prompt and faithful fulfilment by the debtor, immediately upon its receipt, sue for and recover the balance of his original debt. But this is only the logical and necessary result of the elementary doctrine that every contract requires a legal consideration to support it; and that the receipt of what one is already legally entitled to is not such a gain, nor the payment of what one is already fully bound to pay such a loss, as to form a sufficient consideration for any promise or undertaking by a creditor to his debtor.

The doctrine is said to have been derived from the civil law, but was early adopted in the common law, for, in 1602, it was solemnly resolved in *Pinnel's Case*, 5 Co. R. 117, *a*, "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole: and when the whole sum is due, by no intendment the acceptance

of parcel can be a satisfaction to the plaintiff." And the line of authority from that day to this is unbroken, when all the requisite conditions concur.

But the rule itself is so technical, its operation so harsh and apparently so unjust, that courts have ever been ready to confine it within its strictest limits, and have seized upon every opportunity to refuse its application. And in the light of modern decisions, it cannot safely be stated to extend beyond this, "that part payment of a liquidated or undisputed account, made by a debtor to his creditor in money, at the time when, and place where the whole is then payable, not made by way of a joint composition with creditors, is not a legal consideration for the creditor's express but unsealed promise to waive or postpone payment of the balance, and he may immediately sue and recover the rest, notwithstanding a receipt is given in full of all demands."

This conclusion therefore does not follow, unless upon the exact premises above stated. The rule does not apply therefore, 1. Where the claim is unliquidated or disputed. If it be a doubtful claim, or

even *bona fide* disputed, though not in one sense really doubtful; or if it be unliquidated, as a claim in tort where the damages are wholly uncertain, payment of any sum given and received in full satisfaction, is a bar to a suit for any more, however strong the proof might be that the whole was justly due; *Tuttle v. Tuttle*, 12 Met. 551; *O'Donohue v. Woodbury*, 6 Cush. 148; *McDaniels v. Lapham*, 21 Vt. 222; *Palmerton v. Huxford*, 4 Denio 166; *Coon v. Knap*, 4 Seld. 402; *Pierce v. Pierce*, 25 Barb. 243; *Powell v. Jones*, 44 Id. 521; *Bull v. Bull*, 43 Conn. 455; *United States v. Child*, 12 Wall. 232, and many other cases.

2. The question usually arises upon the part payment of an *account*, or open claim; but the rule seems to apply equally to part payment of a bond or note; and the balance of the note, if unsurrendered and uncanceled, may be recovered notwithstanding an endorsement upon it of the receipt of part thereof in full: *Pearson v. Thomason*, 15 Ala. 700. And see *Mordecai v. Stewart*, 36 Geo. 126.

If, however, the note be surrendered or cancelled, the whole claim is discharged, and no action can afterwards be maintained upon such instrument for the unpaid balance: *Kent v. Reynolds*, 8 Hun 559; *Ellsworth v. Fogg*, 35 Vt. 355; *Draper v. Hitt*, 43 Id. 439; *Beach v. Entress*, 51 Barb. 570; *Silvers v. Reynolds*, 22 N. J. 275.

And the same result would follow upon a mere surrender or cancellation of a note with intent to discharge it, even without a partial payment upon it; *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265; *Booth v. Smith*, 3 Woods 19.

This is giving much more effect to a surrender of a note than the delivery of the bill or account, with a receipt in full attached; for it is well settled that even such a receipt does not bar a recovery for the balance of the account: *Fitch v. Sutton*, 5 East 230; *Harriman v. Harriman*,

12 Gray 341; *Ryan v. Ward*, 48 N. Y. 204; *Hendrickson v. Beers*, 6 Bosw. 639.

3. A partial payment, to be an ineffectual extinguishment of a larger debt, must have been made *by the debtor himself*. If made by another from his own money, it is operative, though done at the debtor's instance and request. Therefore, while if a debtor borrows the money of a friend and positively pays the debt, the whole is not discharged, yet if he procures the same friend to go and pay the same amount in person, the creditor is bound by his agreement to accept it in full satisfaction. This certainly seems like forsaking the substance, and clinging to the shadow, but *ita lex scripta est*.

And this rule applies to notes, checks or indorsements of third persons, accepted in payment, as well as to present payment in money: *Steinman v. Magnus*, 11 East 390; *Lewis v. Jones*, 4 B. & C. 506; *Boyd v. Hitchcock*, 20 Johns. 76; *Brooks v. White*, 2 Met. 283; *Kellogg v. Richards*, 14 Wend. 116; *Smith v. Ballou*, 1 R. I. 496; *Colburn v. Gould*, 1 N. H. 279; *Guild v. Butler*, 127 Mass. 386; *Lee v. Oppenheimer*, 32 Me. 253, and numerous other cases.

Therefore if the debtor's wife pays part of the debt, or gives her note and mortgage to secure it, and in consideration therefor the creditor discharges the husband, this is valid and binding: *Keele v. Salisbury*, 33 N. Y. 648; *Bowker v. Harris*, 30 Vt. 424.

And even one partner's private note for half of a partnership debt, has been thought a good consideration for the creditor's agreement to discharge him from the balance; since thereby the creditor acquires the right to look to the private assets of such partner, *pari passu* with his other private creditors, and this may be such a new advantage as to come within the rule of law: *Ludington v. Bell*, 77 N. Y. 138.

4. It is essential also that the part payment should be to the *creditor himself*, in order to be unavailing. A partial payment to another, though at the creditor's in-

stance and request, is a good discharge of the whole debt. The debtor in such case has done something more than he was originally bound to do; or at least something different; it may be more or it may be less, as a matter of fact. His original contract was to pay \$100 to A. His second was a payment of \$50 to B. Thus where H. had a judgment claim against G. for \$1700 and agreed with G. that if he would pay him \$550, and \$100 more to his attorney, this should discharge the whole judgment, and G. did so, the whole debt was held to be cancelled: *Harper v. Graham*, 20 Ohio 106.

5. *In Money*.—Part payment in property, real or personal, personal services or other thing given and received in full payment, is a full discharge, whatever the value of the thing received. COKE states it thus (Co. Litt. sec. 344): "If the debtor pay the creditor a horse, a cup of silver, a ring of gold, or any other such thing, in full satisfaction of the money, and the other receives it, this is good enough, and as strong as if he had received the sum of money; though the horse or other thing were not of the twentieth part of the value of the sum of money; because the other hath accepted it in full satisfaction." This is perfectly well settled law, though the reason given by Ld. COKE may not be entirely satisfactory, for had the payment been in money, the creditor may have "accepted it in full satisfaction," but nevertheless it would not be such in law. The result, however, is sustained by innumerable authorities, some of which are, *Watkinson v. Inglesby*, 5 Johns. 386; *Blinn v. Chester*, 5 Day 359; *Gaffney v. Chapman*, 4 Roberts. 275; *Rose v. Hall*, 26 Conn. 392; *Bull v. Bull*, 43 Id. 455.

Therefore a bar of gold worth \$100 will discharge a debt of \$500; while 400 gold dollars in current coin will not.

And this brings us to the exact question involved in *Goddard v. O'Brien*. Will the debtor's own negotiable note or check for part of his debt, given and

actually received in full payment of the entire claim, and duly paid at maturity, operate in law as such? If the original claim were an account, or an unnegotiable claim, or note, it would seem on principle there could be no doubt about it. The debtor gives and the creditor receives what was not originally contemplated. The advantage, real or supposed, of a negotiable note, for part of an unnegotiable claim, is a sufficient consideration in law for the creditor's agreement not to collect the rest. And this result would seem to follow whether the negotiable note be actually paid or not at maturity, provided it was itself received as an accord and satisfaction. For if an immediate part payment in cash would not discharge the debt, it is difficult to see how payment at some future day, when the new note matures, could have that effect.

The doctrine in *Goddard v. O'Brien*, had been already distinctly announced and acted upon, by the Supreme Court of Pennsylvania, in *Mechanics' Bank v. Huston*, (Feb. 13th 1882), 11 Weekly Notes Cases 389, in which the decided advantage which a creditor acquires by the receipt of a negotiable note for part of his debt, as by the increased facility of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market, &c., was held to furnish ample reasons why it should be a valid discharge of a larger account or open claim unnegotiable.

The question still remains, will the debtor's own unnegotiable note for part of an account, if taken in discharge, have that effect. When we remember how slight a new advantage or benefit to the creditor, or how trifling a new and additional burden, or loss incurred by the debtor is sufficient, it would seem that a written promise, over the debtor's own signature, might be so much better than an open account, or an unwritten or implied promise, even for a larger sum, as to satisfy this technical rule of

law, and operate, if so agreed, as a complete accord and satisfaction.

There certainly seems to be good ground for holding that if as a matter of fact, it be proved that the creditor positively agreed to take a new security or form of obligation in full satisfaction of a larger claim, that the old is extinguished. If a barley corn received in payment can discharge a money claim for \$100, why may not the debtor's note for \$500 if really so agreed upon. If such partial note be secured by a new mortgage of the debtor's property, there is authority for holding that it operates to extinguish the old debt: *Warren v. Skinner*, 20 Conn. 561, *ELLSWORTH, J.*; *Pulliam v. Taylor*, 50 Miss. 251. If so, and the new note be unsecured, and so not so valuable to the creditor, it is only a difference in degree of benefit; in each case the creditor acquires a new advantage, and the law does not attempt to measure the adequacy or sufficiency of the benefit conferred. That the tendency of modern decisions is to hold that a new note for part of an open account is, if so agreed, a valid discharge of the old debt, see *Babcock v. Hawkins*, 23 Vt. 561; *Jaffray v. Crane*, 50 Wis. 349.

It is true *Cumber v. Wane*, 1 Str. 426, is directly against it: but it should be remembered that the law on this subject was not so well understood at that day as at present, and in the light of the modern decisions the question may still be considered an open one.

6. The next requisite for the application of the rule is, that the part payment must be made at, or not *before the time the whole is due*, and not at some different place. For it is clear that a payment in advance is, if agreed to, full satisfaction for a larger claim not yet due; *Co. Litt. 212 b.*; *Brooks v. White*, 2 Met. 283. *Bowker v. Childs*, 3 Allen 434; *Smith v. Brown*, 3 Hawks 580.

In *Mitchell v. Wheaton*, 46 Conn. 315, this rule was applied to a case where one half the debt and the costs

of suit were agreed to be paid, while the suit was pending, and therefore before the claim for costs had become fully perfected by a judgment, for though the principal debt was long overdue, the costs were not, and might never become a debt. So if the partial payment be made at some *different place* from that of the original debt, this is such, or may be such, an additional advantage or convenience to the creditor as to make his agreement binding; *Harper v. Graham*, 20 Ohio 105, 117; *Jones v. Perkins*, 29 Miss. 140; *Smith v. Brown*, 3 Hawks 580; *McKenzie v. Culbreth*, 66 N. C. 534; *Reid v. Hibbard*, 6 Wis. 175.

7. The last requisite for the rule is that such partial payment must not have been made by way of or as a part of a joint scheme with all the creditors to accept a percentage of their claims in full discharge of the whole. For it is now well agreed that if one's creditors sign a joint instrument of discharge, agreeing mutually to accept a part in lieu of the whole, and the debtor agreeing thereto, pays the stipulated amount, no such creditor can afterwards collect the balance, even though the discharge of the debtor be not under seal; *Good v. Cheesman*, 2 B. & Ad. 328 (1831); *Reay v. White*, 1 Cr. & M. 748; 3 Tyr. 596; *Murray v. Snow*, 37 Iowa 410; *Daniels v. Hatch*, 1 Zab. 391; *Farrington v. Hodgdon*, 119 Mass. 453, and many other cases.

In *Steinman v. Magnus*, 11 East 390, *Broune v. Stackpole*, 9 N. H. 478, and many others cited in support of this doctrine, the debtor had also given the security of some third person, for his payment of the composition, and, therefore, for that reason alone, the compromise would be binding.

This effect of a joint composition has been said to rest, however, much, if not entirely, on the ground of the mutual agreement between the creditors, and not merely on the contract between debtor and creditor, and it is con-

sidered unfair to the other creditors to allow one to subsequently recover his debt in full, when the others cannot. And this has been carried so far, as not to allow one creditor to recover on a note subsequently given to him by the debtor for the balance of his debt: *Cockshott v. Bennett*, 2 T. R. 763; *Case v. Gerish*, 15 Pick. 50; *Wiggin v. Bush*, 12 Johns. 306.

And in England the creditor has been even compelled to refund to the debtor a payment actually made in excess of the proportion agreed upon by all, and paid to all the others: *Atkinson v. Denby*, 7 H. & N. 934; *In re Lenzberg's Policy*, 7 Ch. Div. 650.

But if the debtor has enough to pay all the creditors in full, or gives his notes to each for the balance due him, is there any reason in law why this arrangement should be invalid merely because it embraces all the creditors, when it clearly would not be if it extended to only one, and that one was all? It seems not. Perhaps this modification of the rule originally rested upon the ground that the debtor in the joint composition conveys all his property, real and personal, to his creditors, or to trustees for them, and therefore, their agreement to accept part would be binding, upon the principles before stated of accepting property instead of money.

That the whole doctrine of composition rests upon peculiar grounds is evident from the fact that if all the creditors separately agree with their debtor to take a part in full, and do this unbeknown to each other, and not induced thereto by the action of the others, such an arrangement is not a bar to a future

recovery of the balance, by each separate creditor, though all had in fact agreed to a similar deduction: *Bliss v. Shurts*, 65 N. Y. 444; *Sage v. Valentine*, 23 Minn. 102; *Wheeler v. Wheeler*, 11 Vt. 60. And see *Perkins v. Lockwood*, 100 Mass. 249.

The course of decisions on this subject fully illustrate how eager, it may be said, courts are to discover some slight reasons for evading the general rule, and holding the agreement binding on the creditor, whenever the slightest additional advantage to him, or loss to the debtor can be discovered. Perhaps the rule has been sometimes pushed too far. Thus in *Hinckley v. Arey*, 27 Me. 362, it was held that a creditor was bound by his agreement to accept part in full payment, on being informed that the debtor would otherwise go into bankruptcy, and that he would not probably receive so large a dividend, as the composition offered.

But the insolvency of the debtor, his inability to pay others an equal percentage, his pains and trouble in earning or borrowing the money to pay his stipulated sum, cannot be considered any additional legal gain to the creditor or legal loss to the debtor. The latter, in making his payment has done only what he was legally bound to do, and what the creditor had a legal right to demand, and it can make no legal difference whether the debtor inherited the money, or procured it only by extraordinary exertions, or self sacrifice. See *Harriman v. Harriman*, 12 Gray 341; *Bunge v. Koop*, 48 N. Y. 225; *Pearson v. Thomason*, 15 Ala. 700.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of New York.

LOUIS E. HOWARD ET AL. v. JOSEPH PARK, JR., ET AL.

A trade name of a firm is property, and no other persons, without the firm's consent, and not having the same name, can use it in trade to the disadvantage or injury of such firm.

Such trade name may be assigned to a successor firm, which thereby obtains the same rights in said name as its predecessor had.

A dealer in a commodity identical in manufacture and character with that dealt in by such firm and its successor, will be enjoined from the sale of such commodity in a wrapper countersigned with such trade name without authority, even though the dealer purchased the commodity from the original manufacturers, who were authorized to affix the trade name to such of their products as were designed for such firm.

APPEAL from a judgment dismissing the complaint recovered upon trial at special term. The facts are sufficiently stated in the opinion.

Joseph H. Choate and Frederic W. Hinrichs, for appellants.

Stephen A. Walker, for respondents.

The opinion of the court was delivered by

DANIELS, J.—The plaintiffs, as the successors of the firm of Howard, Sanger & Co., have prosecuted this action to restrain the defendants from selling Low's Brown Windsor Soap in packages countersigned with the firm name of Howard, Sanger & Co. The last named firm on the 15th day of March 1878, entered into an agreement with Low, Son & Haydon, of London, in England, for the sale of their soap. The agreement by its terms was to extend to the 1st of April 1881, and it included all the soap of the manufacturers which should be sold in the United States; and when it should be supplied for sale the wrapper containing it was to be countersigned with the name of "Howard, Sanger & Co." At the time when this firm of Howard, Sanger & Co. went out of business three of its members retired, while the plaintiffs, who were also members of that firm, formed a new copartnership for the continuance of the business. This new firm bought out its predecessors, including in the purchase the right to use the name of the old firm and continue the contracts entered into by it, and particularly

that made with Low, Son & Haydon. This purchase operated as an assignment of the contract to the plaintiffs with the right to use the name of the prior firm by countersigning the packages of soap in controversy; and, as that was shortly afterward practically acquiesced in by the manufacturers of the soap, it was sufficient to entitle the plaintiffs to the exclusive right to use the name of the firm of Howard, Sanger & Co. in connection with the sale of this manufacture of soap in the United States. For rights of this nature have been held to be transferable by assignment: *Congress, &c., Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291, 302; *McLean v. Fleming*, 96 U. S. 245, 249; *Kidd v. Johnson*, 100 Id. 617; *Huwer v. Dannenhoffer*, 82 N. Y. 499, 502.

The plaintiffs in this manner having become entitled to use the name of this preceding firm for the purpose of countersigning the wrappers in which the soap was to be put, stand substantially in the same position as the preceding firm itself did. That firm was the exclusive owner of this name. It had a property in it, which no other persons without its consent, not having the same names, could either deprive it of or use in trade to the disadvantage or injury of the firm whose name it was. It was an element of property, inasmuch as it became identified with its trade, which it was entitled exclusively to use and enjoy as long as no other concern having the same name appeared to challenge that exclusive right; *Phelan v. Collender*, 6 Hun 244; *Devlin v. Devlin*, 69 N. Y. 212; *Bell v. Locke*, 8 Paige 75; *Meneely v. Meneely*, 62 N. Y. 427. This name, as it had been used, had become identified with the sales of this soap in the United States. The trade was shown to have been an extensive one, valuable in its results to the parties through whose agency it was carried on. And while, by the terms of the agreement made with the manufacturers, it was to be placed upon all the packages of this soap sent into the United States, the general stipulation on the subject was not intended to include soap sold or sent to other dealers. For by the other terms and provisions contained in the contract it appears to have been clearly contemplated that these packets should all find their way into the hands of dealers in the United States only through the agency of this firm of Howard, Sanger & Co. By the other provisions in the contract this firm was constituted and appointed the sole agents of the manufacturers for the sale of their

soap here, and it was to identify and confine the sale of such soap to that agency that the packets were to be countersigned with its name.

Under these provisions the manufacturers of the soap acquired no authority to place the name of its agency in the United States upon packets of soap not sent to that agency under the terms of the agreement. No license to use the name in any way differing from that was contemplated by the terms of the instrument executed by the parties. But the agreement, on the other hand, was that the firm of Howard, Sanger & Co. should be constituted the sole agents of the manufacturers for the sale of their soap in the United States, and that the soap put up for that purpose should be countersigned in their name. No right or license to use this name for any other purpose whatever was acquired under the agreement, by the manufacturers; and consequently, the firm of Howard, Sanger & Co. still continued, after the agreement was made, entitled to all their proprietary rights in this matter, and by the transfer of its business to the plaintiffs in this case, the latter succeeded to the same rights.

It was shown by the evidence in the case that the defendants received the soap offered for sale and sold by them, through an agent acting in their behalf, directly from the manufacturers. When it was delivered to them, the packages were countersigned with the name of Howard, Sanger & Co. in precisely the same manner as that which was sent directly to the manufacturers' agents. While the manufacturers were at liberty to violate the terms of the contract with their agent, and sell the soap manufactured by them to other persons dealing with them, they had no authority to countersign the packages in this manner. For that not only involved the violation of the terms and spirit of the contract, but in addition to that a misappropriation of the firm name of the agency. The soap which passed into the hands of the defendants was the property of the manufacturers, and they could sell and transfer the title to it to any person dealing with them, for, by the agreement which they had made, they had not divested themselves of their title to such portions of their property. To that extent their rights are entirely different from those affecting the firm name of the agency. While as incidental to their right of property in the soap, they could sell and transfer it to whomsoever they chose, they manifestly could not do so with this name, for they had no

such right, title or interest in it. That, on the contrary, continued to be the property of the agents, and inasmuch as the manufacturers had no other control over it than to place it upon packages of the soap sent to this agency, they could not lawfully place it upon packages of soap sold or delivered to other dealers. To that extent, therefore, the proprietary rights secured to the plaintiffs were violated in the delivery of the packages of soap sold to the defendants, and to restrain such a violation is one of the proper offices of an injunction.

At the time when the defendants commenced their purchases of soap from these manufacturers, they appear to have been guided by no improper motives whatever in doing so, and, as the name of Howard, Sanger & Co. was upon packages as they came from the hands of the manufacturers, they were right in supposing that it had been used with authority in that manner, and so, because they dealt in the article under that conviction, no just complaint could be made of their conduct. But on the 8th day of December 1879, the plaintiffs' exclusive right to the use of this name was brought to the attention of the defendants, and after they had been so notified of the facts it became their duty to desist from selling the soap countersigned with the name of this agency.

The information which was then given to them was a sufficient disclosure of the facts to render them chargeable with knowledge of the terms of the contract under which this exclusive agency had been formed. For it had been made their duty to inquire what were the terms of the agreement that had been made, if they desired further information upon this subject. And their failure to make the inquiry here subjects them to all the responsibilities arising from the acquisition of such knowledge as would have been obtained if the inquiry had actually been made. From the time such notice was received, the defendants consequently had no right to use this soap with the name of Howard, Sanger & Co. upon the package.

And to the extent of restraining the use of that name in the sale made of the soap by the defendants, the action ought to have been sustained. But as to the right of the defendants to purchase this soap of Low, Son & Haydon, and make sales of it in the United States, the case stands upon a different footing. For the soap itself was still the property of the manufacturers, notwith-

standing the agreement which they had made, and it was, therefore, capable of being sold by them and the title to it transferred to the defendants. For that reason the latter had the right to sell it again notwithstanding the fact that the manufacturers in selling it to them had violated the terms of their agreement made with Howard, Sanger & Co. The plaintiffs were not entitled, therefore, to restrain the defendants from either purchasing the soap from these manufacturers or selling it again in the course of their business; neither could they be required to surrender the wrappers in which the soap had been packed. All that they should have been prohibited from doing was the sale of the soap in the wrappers in which it was placed, with the name of Howard, Sanger & Co. upon them. That under the circumstances they have no right to do, for the reason that it violated the plaintiff's property in that name. By the erasure of that name from the packages, and the sale of the soap in that manner, no propriety right of the plaintiffs will be violated. And to that extent the defendants are entitled to make this soap an article of traffic in their business.

The facts that have been found will probably require no further trial of this action for the purpose of determining the rights of the parties. But for the purpose of protecting these rights, the judgment which has been recovered should be reversed, and a judgment directed for the purpose of enjoining and prohibiting the sale of this soap by the defendants with the name of Howard, Sanger & Co. upon the packages. And as that is much less than the plaintiffs themselves have claimed during the progress of this litigation, and it is all that they appear to be entitled to, the judgment should be without costs to either party.

No question of registration appears to have been raised in this case, probably because according to the Act of Congress (March 3d 1881) sect. 3, "no alleged trademark which is merely the name of the applicant shall be registered." All previous congressional legislation on the subject of the registration of trademarks, to wit, the Acts of 1870 and 1876, was declared by the Supreme Court of the United States in *United States v. Steffens*, 100 U. S. 82, to be unconstitutional, and according to the decision of the court upon that occasion, "the whole legislation

must fall, as being void for want of constitutional authority." See 20 Am. Law Reg. 305.

The Act of March 3d 1881 avoids the rock upon which the first and only attempt to *regulate the right of trademarks*, viz., the Act of 1870, was wrecked. That act had assumed to grant protection, by the registration of a trademark, to anybody in the United States, and anybody in any foreign country which permits the like; and the remedies provided when the right of the owner of the trademark is infringed are not confined

to the case of a trademark used in foreign or inter-state commerce or commerce with the Indian tribes, but the words are sufficiently comprehensive to embrace commerce or traffic between citizens of the same state, which is beyond the power of Congress and an invasion of state rights.

The Act of 1881 enacts that "owners of trademarks used in commerce with foreign nations, or with the Indian tribes," &c., "may obtain registration of such trademarks by complying with the following requirements," &c. Thus the question of commerce between owners of trademarks in the same state is judiciously avoided, and even the registration of trademarks used in inter-state commerce is not provided for. By the 4th section it is provided that certificates of such registration shall be evidence in any suit in which such trademarks shall be brought in controversy, and further, that copies of trademarks and of statements and declarations filed therewith shall be received as evidence in any such suit, but there is no attempt to make such registration obligatory. The owners must, however, either be "domiciled in the United States or located in any foreign country, or tribes which by treaty, convention or law, affords similar privileges to citizens of the United States." By sect. 7, the "registration of a trademark shall be *prima facie* evidence of ownership," and counterfeiting or wrongfully using a registered trademark shall render the aggressor liable to an action for damages and to a suit in equity to enjoin from the wrongful use of such trademark used in foreign commerce, &c., and to recover compensation therefor, and the courts of the United States shall have original and appellate jurisdiction in such cases. But by sect. 10, "nothing in this act shall prevent, lessen or impeach any remedy at law or in equity which any party aggrieved by any wrongful use of any trademark might have had if the provisions of this

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act had not been passed." In other words the common-law remedies remain intact, and the common-law right to a trademark is in itself inalienable. See 20 Am. Law Reg. (N. S.) 313.

A trade name is in the case before us acknowledged to be a trademark although the Act of 1881 does not permit of its registration, and such trade name may be assigned to a successor who thereby obtains the same rights as his predecessor had, but no other person not having the same name can use it in trade to the disadvantage or injury of the original owner or his assignee. But further, this case has decided that a dealer in a commodity identical in manufacture and character, and even obtained from the same manufacturer, will be enjoined from the sale of such commodity countersigned without authority with such trade name, in an action brought by the successor of the original proprietor. And this though such dealer purchased said commodity bearing such countersign in good faith from the manufacturer who was authorized to affix the trade name to such products as were designed exclusively for said proprietor and his successor. And lastly, the violation by the manufacturers of their contract with the assignees and their predecessors, although the said manufacturers transferred a good title in the article to the defendants, and the latter could not be restrained from selling the article itself, would, nevertheless, entitle the plaintiffs to a perpetual injunction against the defendants restraining them from selling the said manufactured article in packages bearing the trade name of its original owner or his successor, especially after they had been notified of the facts, notwithstanding the *bona fides* of the defendants in their original transaction with the manufacturers. As Mr. Upton observes, a trademark consists of "a right of property in a mere name, figure, letter-mark, device or symbol, when used as a designation of a thing." It exists "at common law, independent of

all statute provisions which (recognising its existence and the great importance of its protection beyond that afforded it by courts of civil jurisdiction) inflict the penalties of a misdemeanor upon its violation :” Upton’s Treatise on the Law of Trademarks, pp. 14, 15.

Whilst on the subject of the use of a trade name as a trademark it may not be amiss to refer to a case recently decided in England, in which a family name as affixed to a particular secret manufacture became matter of litigation. The case referred to is that of the *Singer Manufacturing Co. v. Loog*, 44 L. T. R. 888, being an appeal by defendant from the judgment of BACON, V. C., Dec. 14th 1880.

The plaintiffs were a company incorporated by the legislature of the state of New Jersey, U. S., under the above style, with a factory in Glasgow, and they claimed, as successors in the business to the firm of Singer & Co., to be entitled to all such interest in and benefit of the name of Singer as their predecessors in the business were entitled to. In an action to restrain the use by the defendant of the plaintiffs’ trade name, the issues were whether the name was a designation of machines of the plaintiffs’ manufacture, or of machines of a particular kind of construction ; whether the defendant had used the name for the purpose of appropriating the reputation acquired by machines manufactured by the plaintiffs’ company or not ; and whether the defendant had, by using the name, induced purchasers to believe they were buying machines manufactured by the plaintiffs’ company. Defendant, who sold (as wholesale agent in London of a company in Berlin) to persons in the trade only, described his machines in his circulars and price lists as machines manufactured on the “Singer” system, or the “Singer improved system,” and by his statement of defence alleged, that as the plaintiffs’ patent had long since lapsed, they were not entitled to any

monopoly of the right of advertising or selling machines manufactured on what was known in the trade as the “Singer System.” Held (reversing the decision of BACON, V. C.), that the plaintiffs’ company had no exclusive right to use the word “Singer,” as applied to sewing-machines, and that there was nothing in the defendant’s circular, price-lists and invoices calculated to deceive and induce purchasers to believe they were buying machines manufactured by the plaintiffs. JAMES, COTTON and LUSH, L. JJ., were unanimous in overruling the injunction granted by BACON, V. C. At the same time it is only right to remark that they none of them treated the word “Singer” as a trademark, but simply as descriptive of the kind of machine by whomsoever made. Indeed the plaintiffs had a separate trademark of metal containing the word “Singer,” with a device which the defendant had to some extent imitated, but abandoned it at an early stage of the suit and undertook never to use it again.

In the “Singer” *Machine Manufacturers v. William Newton Wilson*, L. R., 2 Ch. Div. 434, it was held, in effect, on appeal, affirming the decree of the Master of the Rolls dismissing the bill, that “when a manufacturer A. (Singer) has acquired a reputation in the market, so that the goods made by him are commonly known by his name, but is not possessed of any patent, a rival manufacturer B. (Wilson) being entitled to imitate his goods, is entitled also, provided that he does not place his name on his own goods, to advertise his goods and offer them for sale by the name of A. (Singer), if he takes care to state clearly at the same time that the goods which he sells are manufactured by himself :” JAMES, MELLISH and BAGGALLAT, L. JJ. That case was subsequently reversed in the House of Lords (1877), but without prejudice to any question in the case, in the event of further evidence being given, which

was thereby authorized : 3 Appeal Cases 376. The Singer company claimed the name "Singer" as a trademark, and the House adjudged that fraud was not necessary to be averred or proved in order to obtain protection for a trademark ; but that if the defendant's advertisements were calculated to mislead an unwary purchaser into the belief that he was purchasing machines manufactured and sold by the plaintiffs, then the plaintiffs were *prima facie* entitled to an injunction, although there was not actual intent to deceive.

The English cases are numerous to the same effect and date from an early period to the present time. In *Singleton v. Bolton*, 3 Doug. 293, Lord MANSFIELD said, "If the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie. But here both plaintiff and defendant used the name of the original inventor, and no evidence was given of the defendant having sold it as if prepared by the plaintiff. The only other ground on which the action could be maintained was that of the property in the plaintiff, which was not pretended, there being no patent, nor any letters of administration." In this case there was no evidence of the plaintiff's *exclusive* right to the name "Dr. Johnson's Yellow Ointment," or the mark which both plaintiff and defendant used alike.

In *Carnham v. Jones*, 2 Ves. & B. 218, PLUMER, V. C., said, "The bill proceeds upon an erroneous notion of exclusive property now subsisting in this medicine which Swainson (the original purchaser of the recipe) had a right to dispose of by will, and, as it is contended, to give to the plaintiff the exclusive right of sale. If this claim of monopoly can be maintained, without any limitation of time, it is a much better right than that of a patent." * * * The vice chancellor concluded thus : "The defendant does not hold himself

out as the representative of Swainson, setting up a right in that character to the medicine purchased by him, but merely represents that he sells, not the plaintiff's medicine, but one of as good a quality. He is perfectly at liberty to do so. If any exclusive right in this medicine ever existed it has long since expired." And yet in this case both plaintiff and defendant used the same name to designate the medicine, viz. : "Nelm's Vegetable Syrup," and the defendant represented that his medicine was precisely the same as that made and sold by the late Mr. Swainson.

In *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Jur. (N. S.) 513, Lord CRANWORTH, *inter alia*, said, "Difficulties however may arise where the trademark consists merely of the name of the manufacturer. When he dies those who succeed him (grandchildren or married daughters, for instance) though they may not bear the same name, yet ordinarily continue to use the original name as a trademark ; and they would be protected against any infringement of the exclusive right to that mark. They would be so protected because, according to the ways of the trade, they would be understood as meaning no more by the use of their grandfather's or father's name than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different, if, instead of passing into other hands by devolution of law, the manufactory were sold and assigned to a purchaser. The question in every such case must be whether the purchaser, in continuing the use of the original trademark, would, according to the ordinary usages of the trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trademark."

This appears to define tersely and lucidly the object of such a trademark and

the amount of protection to which it is entitled.

In *Burgess v. Burgess*, 17 Jur. 292, the plaintiff and defendant were both of the same name, and indeed were father and son. The question of a trade-name as a trademark could scarcely be said to be at issue. They both sold a fish sauce under the name of "Burgess's Essence of Anchovies," which description had been originally adopted by the father of the plaintiff and grandfather of the defendant. In giving the opinion of the Court of Appeal, the vice chancellor having refused an injunction and the appeal therefrom being dismissed, KNIGHT BRUCE, L. J., rather facetiously, as was his wont, avoided the difficulty thus: "All the queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the queen's subjects have a right to sell them in their own name, and not the less so that they bear the same name as their father; and nothing else has been done in that which is the question before us. * * * He (the defendant) carries on business under his own name, and sells essence of anchovy as 'Burgess's Essence of Anchovy,' which it is. * * * The only ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr. Burgess's essence of anchovy. That does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovy and selling it under his own name." It should be added that the vice chancellor, though he refused to restrain the defendant from selling the same under the name of "Burgess," had granted the injunction stopping the defendant from appending to the description the words "*late of 107 Strand*," the original place of business and where the plaintiff still continued the business. Thus the sting was taken

out of the case before it went up to the Court of Appeal, the disuse of words thus indicating the defendant to be the same man and conducting the same business as "*late of 107 Strand*" being enjoined in the decree.

In *James v. James*, L. R., 13 Eq. 421, it was held by Lord ROMILLY, M. R., that "any person who has, without the use of unfair means, become acquainted with the mode of compounding a secret unpatented medicine or preparation, may, after the death of the original discoverer, make and sell the compound, describing it by the *name of the discoverer*, provided he does not lead the public to suppose that his preparation is the manufacture of the successors in business of the original discoverer; but he must not assert that his is the only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious."

In *Massam v. Thorley's C. F. Co.*, 6 Ch. Div. 574, it was held by MALINS, V. C., that "any person who has become acquainted with the process of manufacturing an article which is in general secret, is entitled to manufacture it; and if the *name of the first manufacturer* has become attached to the article, any person afterwards manufacturing is entitled to describe it by the *name of such original manufacturer*, and if he happens to be of the same name as the original manufacturer he may use his name in describing his business, or allow it to be used by a company formed by him for the purpose of carrying on the business, notwithstanding that the manufacturers continue to carry on the old manufacture under the old name." This decision seems to be in accord with that of *Burgess v. Burgess*, *supra*.

In *Cheavin v. Walker*, 5 Ch. Div. 850, S. Cheavin and his son G. Cheavin manufactured and sold filterers which had been patented by the father, under the title and marked with the label as "S. Cheavin's Improved Patent Gold Medal

Self-cleaning Rapid Water Filterers." After the father died and the patent expired, G. Cheavin substituted his name in the place of his father's, and continued the manufacture and sale under that name, above which was a medallion containing the royal arms, surmounted by the words "Her Majesty's Royal Letters Patent." The defendant, who had been in the employ of G. Cheavin, began manufacturing and selling in the same town on his own account filterers similar in appearance to G. Cheavin's, and inscribed with "S. Cheavin's Patent Prize Medal Self-cleaning Rapid Water Filterers, Improved and Manufactured by Walker, Brightman & Co.;" and it was held by the Court of Appeal, reversing the vice-chancellor's decision, "First, that the label used by the plaintiff was not a trade-mark, but only a description of the article as made according to S. Cheavin's patent, which, having expired, was common to all the public. Secondly, that there was nothing in the defendant's label calculated to mislead the public by a fraudulent imitation of the plaintiff's label. Thirdly, that the plaintiff's label, coupled with the medallion of the royal arms, constituted a false representation that the patent was still existing, and disentitled the plaintiff to relief by injunction."

With respect to label. In *Farina v. Silverlock*, 6 De Gex, M. & G. 214, it was held by Lord Chancellor CRANWORTH that "in a case where the mark consisted of a label in a certain form, and it was shown that in very many instances labels the same as or similar to it might be sold for a legitimate purpose, the court, in the absence of any proof of actual fraud, refused to restrain the printing and sale of such labels until the manufacturer, who alleged that they were used for a fraudulent purpose, had established his case by an action at law."

Numerous English cases might be

cited to the effect that an injunction ought not to be granted, it not being perfectly clear that the plaintiff had a legal right to the mark of which it was alleged that the defendant's was a false representation. See *Spottiswoode v. Clark*, 10 Jur. 1043. Especially where the plaintiff is himself seeking to deceive the public: *Pidding v. How*, 8 Simons 477; *Motley v. Downman*, 3 My. & Cr. 1; *Clark v. Freeman*, 11 Beav. 112; *Flavell v. Harrison*, 17 Jur. 368; *Perry v. Truefitt*, 6 Beav. 66.

In *Marshall v. Pinkham*, 52 Wis. 572 (1881), CASSADAY, J., delivered the opinion of the court, that the proper name of the manufacturer of an article cannot be made a trade-mark so as to prevent any other manufacturer from affixing such name to a similar article made and sold by him, where no unfair means are used to mislead purchasers into a belief that such article is manufactured by the person who first sold and continues to sell a like article under that name. "A trade-mark," says CASSADAY, J., "performs a distinctive office. As such its use may be protected by the courts. But this does not authorize a monopoly upon fragments of the language, nor the exclusive appropriation of words in common use descriptive of common objects and qualities. It has often been decided that words which are merely descriptive of the kind, nature, style, character or quality of the goods or articles sold cannot be exclusively appropriated and protected as a trade-mark."

He then proceeds to cite *Caswell v. Davis*, 58 N. Y. 223, where it was held that "words or phrases of common use, and which indicate the character, kind, quality and composition of an article of manufacture, cannot be appropriated by the manufacturer exclusively to his own use as a trade-mark."

To the same effect he cites *Taylor v. Gillies*, 59 N. Y. 331. Also, *Canal Co v. Clark*, 13 Wall. 311; *Perry v. True-*

fitt, 6 Beav. 66; *Corwin v. Daly*, 7 Bosw. 222; *Williams v. Johnson*, 2 Id. 1; *Amoskeag Manuf. Co. v. Spear*, 2 Sandf. (S. C.) 599; *Fetridge v. Wells*, 13 How. Pr. 387-8; *Partridge v. Menck*, 2 Barb. Ch. 101; *Popham v. Cole*, 66 N. Y. 69. "From these authorities," he continues, "it is evident that the words 'Rheumatic Liniment,' 'Celebrated Liniment,' and the other words in the label in question, descriptive of the liniment sold, could not be appropriated as a trade-mark."

Mr. Browne, in his treatise, thus states the rule: "The right to the use of the mark must be *exclusive* of all other persons. A trade-mark is an emblem of a man just as much as his written signature, and is used to denote that an article of merchandise has been made by a certain person, or that it has been sold or offered for sale by him. If the same mark were to be used by different persons for the same species of goods, it would lead to inextricable confusion, and its true and legitimate purpose would be overthrown, for then it would lack the essential element of an indication of origin or ownership:" Sect. 303.

In the Wisconsin case of *Marshall v. Pinkham*, *supra*, the subject of the exclusive use of a proper name of the manufacturer of an article is elaborately and exhaustively discussed in the opinion delivered by Mr. Justice CASSADAY, and the cases we have referred to are ably commented on. In that case the label described the manufactured article as "Old Dr. S. Marshall's Celebrated Liniment," and contained other words and a vignette, &c. No unfair means had been resorted to by the defendant to mislead purchasers into a belief that the article sold by him was manufactured by the person who first sold and continue to sell a like article under that name.

"It seems to be the office of a trade-mark to point out the true source, origin

or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. Such is substantially the rule laid down by many authorities." Per CASSADAY, J. *Dunbar v. Glenn*, 42 Wis. 118; *Gillott v. Esterbrook*, 48 N. Y. 374; *Amoskeag Manuf. Co. v. Spear*, *supra*; *Fetridge v. Wells*, *supra*; *Barrows v. Knight*, 6 R. I. 434; *Filley v. Fussett*, 44 Mo. 166; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402. "The words 'Marshall's Liniment,' 'Marshall's Rheumatic Liniment,' 'Marshall's Celebrated Liniment,' 'Old Dr. S. Marshall's Celebrated Liniment,' used in the various labels before us," continues the learned judge, "could only therefore be protected as trade-marks in so far as they pointed out Marshall or old Dr. S. Marshall as the true originator or owner of the liniment to which they were attached." Further on the learned judge remarks: "It would also seem to follow, from the cases cited, that on the death of old Samuel Marshall (assuming that no one succeeded to the good will or the business), any citizen would have the legal right to manufacture liniment composed of the same ingredients and made in the same way as he manufactured that sold by him, and also in making sales, to describe it as such. Upon that assumption the words 'Old Dr. S. Marshall's Celebrated Liniment' were merely descriptive of the compound, and if truthfully applied by the defendant in making sales, no one could rightly complain, as no one had any patent upon it or exclusive right to the use of any words which aptly described it. Upon his death, with no successor to the good will of his business, those words would cease to indicate origin or ownership, and hence cease to be a trade-mark."

In the principal case the court has gone

the length of deciding that a trade-name may be assigned to a successor firm, which thereby obtains the same rights in said name as its predecessor had. The peculiarity in this case is that the proprietors of the trade-name in question were not the manufacturers of the article to which it was affixed, but simply agents for the United States for the sale of an article manufactured by Low, Son and Haydon, of London, England. For the sale of the latter's Brown Windsor Soap, they made a contract by which Low & Co. agreed to countersign each packet of said soap exclusively designed for the said agents, with the name "Howard, Sanger & Co." in the form of the signature of the said firm. That firm was the exclusive owner of this name. "It had," in the words of DANIELS, J., "a property in it which no other person without its consent, not having the same name, could either deprive it of or use in trade to the disadvantage or injury of the firm whose name it was. It was an element of property, inasmuch as it became identified with its trade, which it was entitled exclusively to use and enjoy as long as no other concern having the same name appeared to challenge that exclusive right." *Phelan v. Collender*, 6 Hun 244; *Derlin v. Devlin*, 69 N. Y. 212; *Bell v. Locke*, 8 Paige 75; *Meneely v. Meneely*, 62 N. Y. 427. The name could not be said, as in the case of *Lea & Perrins v. Deakin*, U. S. C. C., Illinois N. D., 18 Am. Law Reg. (N. S.) 322, to have become generic. In that case Judge DRUMMOND refused to restrain the use of the word "Worcestershire," as applied to a sauce, not only on the above ground, but because persons residing at a place of that name in England, and who there manufactured and sold the sauce, did not thereby acquire the *exclusive* use of the name as a trade-mark. An injunction had previously been refused by Sir George JESSEL, Master of the Rolls, from whose decree (1876) no appeal

was lodged. On the contrary, it appears to have been acquiesced in.

The remarkable feature in the principal case, consists in the fact that there was no attempted injunction as to the manufactured article itself, the same soap being supplied to both parties alike. There was no attempt on the part of the defendants to pass off their goods as those of the plaintiffs, and therefore it is that the defendants were only enjoined to discontinue the use of the plaintiffs' wrappers, with the name of Howard, Sanger & Co. upon them, which had been furnished them through a breach of the contract between the manufacturers of the soap and the plaintiffs. The plaintiffs, as the court observed, were not entitled to restrain the defendants from either purchasing the soap from these manufacturers or selling it again in the course of their business. Neither could they be required to surrender the wrappers in which the soap had been packed. The proprietary rights of the plaintiffs had been violated in the delivery of the packages of soap sold to the defendants with the plaintiffs' name on such packages. Originally the defendants were actuated by no improper motives, rightly supposing that the name of plaintiffs had been used with authority by the manufacturers. But when notified that the plaintiffs were entitled to the *exclusive* use of that name they should have desisted from selling the soap countersigned with the name of the agency. In the case of the *Singer Manuf. Co. v. Loag*, *supra*, JAMES, L. J., remarked: "I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods; always subject to this, that he must not, as I said, make directly, or through the medium of another person, a false representation that

his goods are the goods of another person. That I take to be the law. I am of opinion that the label was calculated to deceive, and was calculated to make a false representation as between somebody who did not know who the real manufacturer was and his vendor." This, however, could not be said of the principal case. The label, in that case, was the same and the manufactured article the same.

Let us see how far LUSH, L. J., endorses the sentiments of Lord Justice JAMES: "We are not dealing with the validity of a patent. The plaintiffs have no monopoly in the manufacture of sewing machines; the patents which they had expired some years ago, and it is now open to all the world to make the identical machines which they make, and to imitate theirs in every particular. Nor have they any right of property in the name "Singer," in the sense in which they seek to use it, namely, in the sense that they can restrain every competitor from using the word "Singer" as descriptive of the kind of machine, however he may qualify or explain it. What they have a right to require is that which is common to every manufacturer of goods, namely, that no competitor shall be at liberty to attempt to put off goods of his own manufacture as being goods of the manufacture of another. That is the right which they have, and no other; and the question here is, has the defendant, in his mode of carrying on his business, represented in any way to those who buy his machines that they are buying the machines which are the manufacture of the Singer Manufacturing Company? If he has, then he is guilty of a fraud towards the buyer, because upon that supposition he has misled the buyer, and he has at the same time been guilty of a fraud towards the Singer Manufacturing Company, because upon the same hypothesis he has deprived them of a customer; but if he has not, it does not signify

that he has sold identically the same machines, or that he has put a name upon them which is the same name they use, if he takes care that he does not so use that name or word as to convey to the buyer the meaning that they have been manufactured by that other company."

In the principal case, if the plaintiffs endeavored to convey by the labels marked with their name that they were the manufacturers of the soap in question they were themselves deceiving the public, and would have had no title to relief in equity. It might have been an innocent deception, as they obtained and sold the real article, but it was an act that might at any time be seriously perverted. The defendants appear to have proceeded one step more by using the plaintiffs' labels, as supplied them by the manufacturers, and thereby, however innocently, doubly deceived the public, but without inflicting public injury, for like the plaintiffs, they sold the real article, "Low's Brown Windsor Soap." Doubtless the plaintiffs were damaged by the loss of customers consequent upon this division of trade. But *quere* whether that alone is sufficient upon which to ground an injunction to discontinue the use of the labels or wrappers supplied by the manufacturers of their own accord and spontaneity? What had the defendants to do with the breach of contract on the part of the manufacturers as against the plaintiffs? The plaintiffs had their remedy for such breach. The public was not damaged, but the rather benefited by the competition. The object of the plaintiffs had been to establish a monopoly by entering into an agreement with the manufacturers in London to supply them up the 1st April 1881 with all the soap which should be sold in the United States; and when it should be supplied for sale the wrapper containing it was to be countersigned with the name of Howard, Sanger & Co. As Howard,

Sanger & Co. were not the manufacturers, if such counter-signature meant anything it meant that they were the sole agents in the United States for such manufacturers, but surely the defendants were not responsible for the breach of faith on the part of the manufacturers. If, however, such was not the interpretation to be put upon the counter-signature, then the plaintiffs were guilty of a pious fraud upon the public by leaving such a question open to a doubtful inference, when the words "sole agents" would have removed all ambiguity. The lack of such explanatory words would seem to identify them with the manufacture itself, and the defendants can scarcely be blamed for accepting the same label gratuitously and spontaneously furnished them by the manufacturers themselves. It would almost seem as if the plaintiffs had overreached themselves in their eagerness to monopolize the trade in this article, and that their real remedy was for breach of contract against the manufacturers rather than by injunction to restrain the use of that which had not damnified the public or the manufacturer, however it might have affected the profits of the plaintiffs in dividing with them the credit of a position of ambiguous inference, in the one case the subject of special agreement, and in the other of ordinary mercantile arrangement between manufacturers and their agents, leaving the former to label their packets as they thought fit.

In the Superior Court of Cincinnati (*Singer Manuf. Co. v. Brill*, not yet reported), the court, FORAKER, J., after referring to the opinion of the lord chancellor expressed in the House of Lords in the case of *Singer v. Wilson*, *supra*, enjoined defendant from using the name "Singer," either alone or in combination with other words, in advertisements of his machine, and from selling sewing-machines having the external appearance, shape or ornamentation of

the machines of plaintiffs' manufacture. The court, in the course of its opinion, propounded the following query: "Can there be infringement of a trade name by merely advertising an article by the name * * * without selling or offering it with the name attached?"

"However it may be in the case of a trademark, as distinguished from a trade name, I am satisfied both upon reason and authority that there may be infringement in that way of a trade name. 'I don't know how I can better show this authority and the reason of it than by quoting from the opinion of the lord chancellor in the case of *Singer v. Wilson*, L. R., 3 App. Cases 389, where he says, speaking upon this point: 'My lords, I am unable to see that this makes any difference in point of principle. It may well be that if an imitated trademark is attached to the article manufactured, there will, from that circumstance, be the certainty that it will pass into every hand into which the article passes, and be thus a continuing and ever present representation with regard to it; but a representation made by advertisements that the articles sold at a particular shop are articles manufactured by A. B. (if that is the legitimate effect of the advertisements, which is a separate question) must, in my opinion, be as imperious in principle, and may possibly be quite as injurious in operation, as the same representation made upon the articles themselves.'

"The next question here presented is that suggested by the parenthetical sentence of the lord chancellor, as above quoted, viz.: What is the effect of the advertisements made by the defendant?" FORAKER, J., then proceeds to deal with the defendant's advertisements and arrives at the conclusion that the plaintiff's right of property in the word "Singer," as a trade name, had been infringed by the defendant.

In *Morgan, Sons & Co. v. Troxell et al.*, Sup. Ct. of N. Y., Gen. Term, be-

fore DAVIS, C. J., BRADY and BARRETT, JJ., 23 Hun 639, BARRETT, J., says, expressing the opinion of the court, "A trademark is not necessarily limited to a device or name. The true rule is well stated in the late English case of *Mitchell v. Henry*, 43 L. T. R. (N. S.) 186. In that case Lord Justice JAMES observed, 'the Master of the Rolls seems to me to have considered that when he had satisfied himself, on the examination of the things before him, that the twisted thread in the defendant's selvage was in a position different from that of the plaintiff's, and that the plaintiff's selvage could not be said to be white, then that determined the question. I am bound to say that to me the question is not whether the selvage is white, but whether it was what the trade knew as white selvage; whether anybody connected with the trade could have any doubt whatever as to what was meant by white selvage. Then it is not at all conclusive to my mind whether the position of the defendants is the same or different from the position of the plaintiffs. It resolves itself into the old question, which has always been the question to be determined in these cases—are the defendants, not in words, but by acts and by something on the face of the articles, representing their goods as being the goods of the plaintiffs? That is to say, are they using something which is calculated to pass off their goods as the goods of the plaintiffs?'

"It all comes to this," continues Judge BARRETT, "as was said in *Perry v. Truefit*, 6 Beav. 66, 'a man is not to sell his goods under the pretence that they are the goods of another.' The law does not limit the form of the pretence; that depends upon the facts of each particular case." We are, we confess, unable to discover in what respect the defendants in the principal case pretended that the goods they sold were the goods of another other than the manufacturer, or that by anything on the face of the articles, they represented

their goods as being the goods of the plaintiffs. They simply represented them as what they were, viz., the goods or articles manufactured by Low, Son & Haydon, of London, England, and, it might be added, the same as sold in the United States by the plaintiffs, as verified by the counter signature of their name of "Howard, Sanger & Co." impressed on a wrapper supplied by the manufacturers themselves to the defendants, who were at the trial wholly ignorant of any contract of an *exclusive* character between the manufacturers and the plaintiffs, and held no other relation to the transaction than that of purchasers from the same manufacturers of the same article as that which the plaintiffs themselves had purchased from the same source, with the same label affixed by the manufacturers in both instances, without any collusion on the part of the defendants. As was observed by the court, "The facts that have been found will probably require no further trial of this action for the purpose of determining the rights of the parties." And as the injunction simply prohibits the sale of the soap by the defendants with the name of Howard, Sanger & Co. upon the packages, the case is scarcely likely to be carried further, the object of the public being to obtain the genuine article from the manufacturers Low, Son & Haydon, leaving them to settle their difference with Howard, Sanger & Co., on the question of breach of contract. As that contract expired on 1st April 1881, the trade in the soap in question may henceforth probably be considered as open to all who desire to engage in it as agents in the United States for the manufacturers of that article, each agent appending, if he sees fit, his own name or counter-signature to the packages received from the manufacturers. To this arrangement the consent of the manufacturers may be deemed a foregone conclusion, even if such consent were indispensable.

HUGH WEIGHTMAN.

New York.

Court of Chancery of New Jersey.

MARY ANN HESKETH v. JOHN MURPHY, EXECUTOR.

A trust "to employ the annual income of the said moneys so invested, and from time to time to be invested, for the relief of the most deserving poor of the city of Paterson aforesaid forever, without regard to color or sex ; but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund," with a power of appointing and substituting trustees for those named, is a valid charity, and will be executed.

BILL to set aside trust for charity. The facts are sufficiently reported in the opinion.

D. C. Bolton and *W. B. Gourley*, for complainant.

H. A. Williams, for defendant.

The opinion of the court was delivered by

RUNYON, Chancellor.—William S. Malcolm, late of Paterson, died in 1872. His will contained the following provision :

"After the death of my said wife, I hereby empower and direct my said trustees or trustee for the time being of this my will, to employ the annual income of the said moneys so invested, and from time to time to be invested, for the relief of the most deserving poor of the city of Paterson aforesaid forever, without regard to color or sex ; but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund. And for the purpose of preserving and continuing a perpetual succession of trustees for the purpose of carrying into full effect the provisions of this my will, I do hereby empower my said trustees or trustee for the time being, if any, whether retiring from the office of trustee or not, or if none, then I direct and hereby empower the proving executors or executor for the time being, or the administrators or administrator for the time being, of the last surviving trustee, to substitute by any proper writing under his, her or their hands or hand, any fit person or persons in whom alone, or, as the case may be, jointly, with the surviving or continuing trustees or trustee, my trust estate shall vest or proper assurance be vested."

The objection made to the gift is that it is too indefinite, especially seeing that, as it is contended, no power of selection of

the objects is conferred. The gift is for the relief of the most deserving poor of the city of Paterson, without regard to color or sex, to whom alone it is to be confined. A gift for the relief of the poor of a city generally, is undoubtedly a valid charity: *Shelf on Mortmain* 62. And so, too, where the gift is confined to a certain class of poor persons, as to poor, pious persons: *Nash v. Morley*, 5 Beav. 177; or, to the widows and orphans (construed to mean poor widows and orphans) of a parish: *Atty.-Gen. v. Comber*, 2 Sim. & Stu. 93; and the deserving poor of a town: *Goodell v. Association*, 2 Stew. Eq. 32. "Where," says Lord HARDWICKE, in *Atty.-Gen. v. Pearce*, 2 Atk. 87, "testators have not any particular person in their contemplation, but leave it to the discretion of a trustee to choose out the objects, though such person is private, and each particular object may be said to be private, yet in the extensiveness of the benefit accruing from them they may very properly be called public charities. A sum to be disposed of by A. B. and his executors, at their discretion, among poor housekeepers, is of this kind." The general principle is that courts of chancery uphold and administer gifts where they are made to particular purposes which are charitable within the letter and spirit of the statute (43 Eliz. c. 4), or where they are made to charity generally, if there is a trustee with power to make them definite: *De Camp v. Dobbins*, 2 Stew. Eq. 36. In the case in hand the testator describes a class of persons for whose relief the trust is designed, and the duty of selection necessarily and obviously falls on the trustee. By the terms of the gift he is to employ the income for the purpose mentioned. For want of a trustee this court would appoint one to execute the trust. In *Barclay v. Maskelyne*, 4 Jur. (N. S.) 1294, where the gift was for the benefit of such poor persons emigrating as the trustees should consider most deserving, and the trustees declined to act, the court directed a scheme for the execution of the trust. The gift in question is a valid charity.

The following cases show instances of similar bequests to the poor which have been upheld as charities; to poor men decayed by misfortune or the visitation of God: *Skinner's Case*, Moore 129; for the marriage of poor virgins: *Porter's Case*, 1 Co. 26; for poor dissenting ministers living in any county: *Waller*

v. Childs, Amb. 524; to place out apprentices and to be lent to decayed tradesmen: *Attorney-General v. Coventry*, 2 Vern. 397, Colles's P. C. 280; to the poor inhabitants of S.: *Attorney-General v. Clarke*, Amb. 422; to the poor: *Attorney-General v. Ranre*, Amb. 422 n.; *Attorney-General v. Peacock*,

Finch 245; for the poor inhabitants of S., in the county of H., and of B., in the county of H.: *Hereford v. Adams*, 7 Ves. 324; for the relief of the poor of S.: *Attorney-General v. Wilkinson*, 1 Beav. 372; to churchwardens to distribute amongst twelve poor people who had lived in the parish for twelve years, "in honest fame and opinion:" *Attorney-General v. Bovill*, 1 Phill. 762; for the aid and relief of the poor citizens and inhabitants of E., "who are heavily burthened with the fee farm rents of that city, and other impositions and talliages:" *Attorney-General v. Exeter*, 2 Russ. 445, 3 Russ. 395; to the poor inhabitants of T. R.: *Rogers v. Thomas*, 2 Keen 8; to the widows and orphans of L.: *Attorney-General v. Chamber*, 2 Sim. & Stu. 93; to the widows and children of seamen belonging to the town of L.: *Powell v. Attorney-General*, 3 Meriv. 48; to such poor widows or creditable, industrious unmarried women, upwards of forty years of age, residing in U. and C., having no relief from those places: *Russell v. Kellett*, 3 Sm. & Giff. 264; to the overseers of the poor of S., to be applied to their use and benefit, in aid of the poor rate: *Preece v. Houcells*, 2 B. & Ad. 744; for the relief of the widows and orphans of the clergy of W.: *Kilvert's Trusts*, L. R., 12 Eq. 183, 7 Ch. App. 170; for the education of poor children at a school about to be erected near C.: *Society v. Price*, 7 Irish Eq. 260; to the monks of S., to provide clothing for the poor children attending their schools: *Carbery v. Cox*, 3 Irish Ch. 231; for building a house for reduced gentlewomen: *Attorney-General v. Power*, 1 Ball & B. 145; *Attorney-General v. Tancred*, 1 Eden 10; for clothing such poor children as should be educated in the school of the nunnery of W., Id.; to the poor "on my little estate in S.:" *Bristow v. Bristow*, 5 Beav. 289; among poor pious persons, male or female, old or infirm, as the executors see fit, not omitting

large and sick families, if of good character: *Nash v. Morley*, 5 Beav. 177; to be disposed of by A. B. and his executors at their discretion, among poor housekeepers: *Attorney-General v. Pearce*, 2 Atk. 87; to faithful domestic servants settled in G.: *Miller v. Rowan*, 5 Cl. & Fin. 99. See *Reeve v. Attorney-General*, 3 Hare 191; *Loscombe v. Wintringham*, 13 Beav. 87; to widows or orphans of non-conformist ministers, not being at the time worth upwards of 100l. a year, and widows being upwards of fifty years of age: *Attorney-General v. Gleg*, 1 Atk. 356; to be yearly disposed of for ever in relieving the distressed and poor about G., in meat, drink and clothing, at the discretion of the executor, forever: *Attorney-General v. Johnson*, Amb. 190, note; "some donation out of my property to the poor of the different places where I have estates:" *Paice v. Canterbury*, 14 Ves. 363; in relieving such distressed persons, either the widows or children of poor clergymen or otherwise, "as my said wife shall judge most worthy and deserving objects:" *Wuldo v. Coley*, 16 Ves. 206; see *Norris v. Thomson*, 4 C. E. Gr. 308, 5 Id. 489; an annuity to three parishes of L., for the poor of the parishes, and the residue for the use of the poor in general forever: *Attorney-General v. Matthews*, 2 Lev. 167. To trustees, in such way as they might judge best calculated to promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of S. and W.: *West v. Shuttleworth*, 2 Myl. & K. 684. See *Att.-General v. Marchant*, L. R., 3 Eq. 424; to the vicar and churchwardens of the parish of O., for the benefit of the poor of the parish of O. and adjoining parishes: *Attorney-General v. Brandreth*, 1 You. & Coll. Ch. 200. See *Edinburgh v. Aubrey*, Amb. 236; to pay and divide the residue at Christmas every year for ever, amongst the aged poor of the parish: *Fisk v. Attorney-General*, L. R., 4 Eq. 521; for the

employment and support of the poor of the parish of R.: *Attorney-General v. Blizard*, 21 Beav. 233; to commissioners of emigration, for the benefit of poor persons emigrating to certain designated colonies: *Barclay v. Maskelyne*, 4 Jur. (N. S.) 1294; to forty decayed families that are come to poverty purely by losses unavoidable; to forty poor widows upwards of fifty years of age, and not worth 40l.; to forty poor maidens whose parents formerly lived well, and are come to decay; to twenty poor boys to clothe and put out to apprentice: *Attorney-General v. Speed*, West's Ch. 491; to be divided equally, twice in the year, between twenty aged widows and spinsters of the parish of P.: *Thompson v. Corby*, 27 Beav. 649; to purchase land, to be let out to the poor at a low rent: *Crafton v. Frith*, 15 Jur. 737. See *Attorney-General v. Leigh*, 2 Ves. 389; *Attorney-General v. Whitchurch*, 3 Id. 141; *Attorney-General v. Drapers' Co.*, 2 Beav. 508; *Reeve v. Attorney-General*, 3 Hare 191; for the relief of the poor in W.: *Wilkinson v. Malin*, 2 Cr. & Jer. 636; to be distributed every Sunday, after morning service, by the minister and churchwardens of D. among so many poor of the parish as were most constant in attending divine service: *Ashton's Charity*, 27 Beav. 115; for the most poor and needy that be of good life and conversation that should be inhabiting the parish of K.: *Cumpton Charities*, L. R., 18 Ch. Div. 310; for providing a proper school-house for the instructing of twenty poor girls of the parish of B. in needle-work, reading and writing, and also for clothing them: *Johnston v. Swann*, 3 Madd. 457; also, *Attorney-General v. Williams*, 2 Cox C. C. 387; *Attorney-General v. Lepine*, 2 Swanst. 181; to the incumbent of U., for providing wine and bread for the sick poor of U.: *Birkett's Case*, L. R. 9 Ch. Div. 576. See *Straus v. Goldsmid*, 8 Sim. 614; *Attorney-General v. Haberdashers' Co.*, 1 Myl. & K. 420;

in supporting or founding free or ragged schools for gutter children, or for the poorest of the poor: *Morley v. Crozon*, L. R., 8 Ch. Div. 156. See *School Board v. Fulconer*, Id. 571; to the incumbents of C. and S., to be divided equally amongst three poor sick infirm people residing in their respective parishes: *Williams's Case*, L. R., 5 Ch. Div. 735; the surplus to be given by testator's executors every year to poor pious members of the Methodist society of G. above the age of fifty years: *Dawson v. Small*, L. R., 18 Eq. 114; 50l. for the poor of T.: *Kane v. Cosgrave*, 10 Irish Eq. R. 211; for an almshouse for aged men and women; for schools for poor boys and poor girls, and that every poor boy and girl, when leaving the school, have a "whole duty of man," or some other of the books of devotion named; to redeem poor persons out of prison: *Attorney-General v. Bishop of Limerick*, 5 Irish R. Eq. 403. See *Thrupp v. Collett*, 26 Beav. 125; *Attorney-General v. Painter Co.*, 2 Cox C. C. 51; to set the poor on work, and otherwise for the relief of the poor, in such parishes and such manner as the trustees named or their survivor should think fit, so as the parish of S., in the city of R., should be one of them: *Attorney-General v. Buller*, Jac. 407; to trustees to pay the interest and dividends to the poor inhabitants of the parish of L., in the county of M., for ever, by half-yearly payments: *Attorney-General v. Freeman*, Dan. 117, 5 Price 425. See *Attorney General v. Ward*, 3 Ves. 328; to V., his executors, &c., desiring him to dispose of the same in such charities as he thought fit, recommending poor clergymen with large families and good characters: *Moggridge v. Thackwell*, 1 Id. 464, 7 Id. 36; bread to be distributed to poor persons attending divine service, and chanting testator's version of the Psalms [which could not be chanted, because not authorized], *Brantham v. East Burgold*,

2 Ves. 388; to give a quartern loaf of bread to twenty persons weekly: *Limbrey v. Gurr*, 6 Madd. 151; a moiety to be laid out in buying corn and firing, to be given to the poor of W. about Christmas or New Years day: *Attorney-General v. Wisbech*, 6 Jur. 655; to buy and distribute one hundred and thirty-eight quarters of coals, or money to buy coals at 8d. per quarter, amongst the poor: *Yordon's Charity*, 5 Sim. 571; for clothing and educating eight poor boys in E.: *Latymer's Charity*, L. R., 7 Eq. 353; for the garments of twelve poor men and twelve poor women, at a specified price; *Merchant Tailors' Co. v. Attorney-General*, L. R., 11 Eq. 35. See *Attorney-General v. Wax Chandlers' Co.*, L. R., 5 Ch. App. 503; to keep a house in readiness for the reception of poor plague patients during their sickness, and for a burial-place for such as are deceased: *Attorney-General v. Earl of Craven*, 21 Beav. 392; to poor relations, or, in default of them, to poor persons in the county of A.: *Campbell v. Earl of Radnor*, 1 Bro. C. C. 271; to necessitated decayed freemen of a designated company, their widows and children, not exceeding 10l. a year to any family: *Ironmongers' Co. v. Attorney-General*, 10 Cl. & Fin. 908; to and for the support, maintenance and education of the poor white citizens of Kent county generally: *State v. Griffith*, 2 Del. Ch. 392, 421; for the education of poor children belonging to the county: *Newton v. Starke*, 46 Ga. 88 [overruling *Beall v. Drane*, 25 Id. 430]; to the poor of Madison county: *Heuser v. Harris*, 42 Ill. 425; *Prickett v. People*, 88 Id. 115; to the education of colored children in the state of Indiana: *Lindley's Case*, 32 Ind. 367 [see *Grimes v. Harmon*, 35 Id. 198]; to the county of O., in the state of Indiana, for colored children of said county: *Craig v. Secrist*, 54 Ind. 419; for the sole relief and benefit of poor widows over the

age of fifty years, of irreproachable character, who have resided not under three years within eight miles of the town of W., and who have no certain income: *De Bruler v. Ferguson*, 54 Ind. 549; to the commissioners of L. county, for the use and benefit of the orphan poor, and for other destitute persons, of said county: *Commissioners v. Rogers*, 55 Ind. 297; for educating some poor orphans of this county, to be selected by the county court, * * * and to be confined to such as are not able to educate themselves: *Moore v. Moore*, 4 Dana 354; to the suffering poor of the town of A.: *Howard v. Am. Peace Soc.*, 49 Me. 288; for the comfort, relief and welfare of the poor and distressed within the neighborhood of P.: *Deering v. Adams*, 37 Me. 264; to deserving relations and such indigent persons as they (the executors) may think worthy of the same, and in such manner as they may think proper: *Drew v. Wakefield*, 54 Me. 291; to the first committee of the school society in the town of R., for the use and benefit of such families in said society in their schooling as shall not exceed, in the list of the town for the year, the sum of \$50: *Birkard v. Scott*, 39 Conn. 63; to purchase fuel, to be given or sold at low prices, as may be deemed best by the trustees, to such worthy and industrious persons as are not supported in whole or in part at the public expense: *Webb v. Neal*, 5 Allen 575; to provide and sustain a home for respectable, destitute, aged, native-born American men and women: *Odell v. Odell*, 10 Allen 1; to provide groceries for the sick and infirm, and clothing and fuel for the helpless and needy: *Washburn v. Sewall*, 9 Metc. 280; to be applied to the use of the poor of Old South Church: *Attorney-General v. Old South Society*, 13 Allen 474; to pay over to such of the aged and infirm native-born inhabitants of K., and maiden ladies who are native-born in-

habitants of K., although they be not aged, as shall be deemed, by the person appointed for that purpose by the town of K., most needy, and no part shall be paid to any person who is receiving support as a pauper : *Fellows v. Miner*, 119 Mass. 541; to take, receive and distribute the same among the poor, meritorious widows living and belonging within the limits of the First Ecclesiastical Society of the town of N. : *Sohier v. Burr*, 127 Mass. 221; to furnish relief to all poor emigrants and travelers coming to S. on their way *bona fide* to settle in the West : *Chambers v. St. Louis*, 29 Mo. 543; to be divided between two townships, according to their population, for the purpose of educating their poor orphan children, and any surplus to the poor widows : *Mason v. Trustees*, 12 C. E. Gr. 47; to testator's brother, to be applied at discretion to alleviating the wants and sufferings of the deserving poor of M. : *Goodell v. Union Assem.*, 2 Stew. Eq. 32; for the relief of such indigent persons residing in the town of F. as the trustees for the time being shall select : *Shotwell v. Mott*, 2 Sandf. Ch. 46 [see *Bascom v. Albertson*, 34 N. Y. 609]; to executors, to apply at their discretion \$50 a year to the relief of the poor of S. church, for a specified number of years : *McLoughlin v. McLoughlin*, 30 Barb. 458; for the education of the children of the poor, who shall be educated in the academy in the village of H. : *Williams v. Williams*, 8 N. Y. 525 [see *Bascom v. Albertson*, 34 N. Y. 617]; for the establishment of a free school or schools for the benefit of the poor of D. county : *State v. McGowen*, 2 Ired. Eq. 9. See *Black v. Ligon*, Harp. Eq. 205; after the death of B. to the poor of the county of B. : *State v. Gerard*, 2 Ired. Eq. 210; to the bishop of North Carolina, in trust for the poor orphans of the state, and the said bishop and his successors to have the right to select such orphans : *Miller v. Atkinson*, 63 N. C. 537. See *Jack v.*

Reilly, 2 Hud. & Bro. 301; *Mullanphy v. Peterson*, 1 Mo. 758; a school for orphan children or the children of poor and indigent parents, "who, in the judgment of my trustees, are best entitled to the donation, and it is my wish to clothe and maintain the indigent scholars as well as school them:" *Griffin v. Graham*, 1 Hawks 96; to establish a school in the town of Z. for the poor children of said town : *Zanesville Manuf. Co. v. Zanesville*, 9 Ohio 203; 20 Id. 483; 17 Ohio St. 352; to such of the poor and needy and fatherless of J. and M. townships as are not able to support themselves : *Urney v. Wooden*, 1 Ohio St. 160; to a church, to be laid out in bread annually for ten years, for the poor of the congregation : *Witman v. Lex*, 17 S. & R. 88; to a city to erect a hospital for the relief of the indigent blind and lame : *Philadelphia v. Elliott*, 3 Rawle 170; to alleviate the suffering of the most prudent poor, but not the intemperate, in procuring food, clothing and other necessities which such persons want in winter : *Grandon's Estate*, 6 W. & S. 537; for the distribution of good books among poor people in the back part of Pennsylvania : *Pickering v. Shotwell*, 10 Penn. St. 23. See *Attorney-General v. Stepney*, 10 Ves. 22; *Broune v. Yeall*, 9 Id. 406; to found a college for white male orphans, preference being given to orphans born in the city of P. : *Soohan v. Philadelphia*, 33 Penn. St. 9; *Philadelphia v. Girard*, 45 Id. 9; *Vidal v. Girard*, 2 How. 128; 7 Wall. 14; the poor of several specified churches, during the winter, at the discretion of the pastor or trustees : *Yard's Appeal*, 64 Penn. St. 95; to apply the interest for ten years to the support of the poor of N. township, then to keep the principal for the use of the county forever : *Lawrence v. Leonard*, 83 Penn. St. 206; among poor white housekeepers and roomkeepers of good character residing in P. ; *Philadelphia v. Fox*, 64 Penn.

St. 169; to apply to the relief of the destitute in such manner as charity is usually distributed by the minister at large in the city of B.: *Derby v. Derby*, 4 R. I. 414; to the M. church * * * for the purchase of Bibles and religious tracts, and the distribution of the same among the destitute: *Attorney-General v. Jolly*, 1 Rich. Eq. 99; 2 Strobh. Eq. 379; to found a school for testator's children and their descendants, and those of his brothers and sisters, and such of the poor children of the county as the trustees might select: *Franklin v. Armyfield*, 2 Sued 305; also *Pachal v. Acklin*, 27 Tex. 173; *Perin v. Carey*, 24 How. 465; to the city of C., for the use and benefit of the poor of said city: *Hornberger v. Hornberger*, 12 Heisk. 635; to the ministry and vestry of the parish of L., for the use of the poorest inhabitants of the said parish, being honest people: *Richmond Co. v. Tayloe*, Gilm. (Va.) 336; to be expended in the education of the scholars of poor people in the county of O.: *Clement v. Hyde*, 50 Vt. 716; for the education and tuition of worthy indigent females: *Dodge v. Williams*, 46 Wis. 70; to erect an orphan asylum in or near R., * * * to be open for the reception of all orphan children in said county, and such other poor, neglected and destitute children as the managers * * * may agree to receive: *Gould v. Taylor Orphan Asylum*, 46 Wis. 106. See *Russell v. Allen*, 5 Dill. 235; to the cities of N. and B., one-half to each, for the education of the poor in those cities: *McDonogh v. Murdoch*, 15 How. 367; \$1000 to be paid by my executor for the education of the freedmen of this nation, his best judgment and discretion to be exercised in said appropriation: *McAllister v. McAllister*, 46 Vt. 272. See *Meeting Street Society v. Hail*, 8 R. I. 234; to V. and C., to be received and loaned out by three commissioners of V. and C., and applied by them to the education and tuition of all the pau-

per and poor children of V. and C., whose parents are not able to support them: *Williams v. Pearson*, 38 Ala. 299; for an asylum for destitute orphan boys and girls at M.: *Milne v. Milne*, 17 La. 46; for the benefit of the poor: *Loring v. Marsh*, 2 Cliff. 469; for the support of poor and old women: *Gooch v. Association*, 109 Mass. 558; for the relief of the Jewish poor: *Mayer v. Society*, 2 Brews. 385; also *Isaac v. Gompertz*, Amb. 228, note; *De Costa v. De Pas*, 2 Swanst. 490, note; for the benefit of needy single women and widows; for the education and instruction of poor and needy children in B., to furnish them with necessary clothing while attending school: *Swasey v. Amer. Bible Soc.*; 57 Me. 523; for the education of pious, indigent youths: *McCord v. Ochiltree*, 8 Blackf. 15; to the five monthly meetings of women Friends held in P., towards the relief of the poor members belonging thereto: *Magill v. Brown*, Brightly (Pa.) 346; a devise of lands for a site for the erection of a hospital for foundlings: *Ould v. Washington Hospital*, 1 McArth. 541; 95 U. S. 303; in trust for the county of A., for establishing and supporting a manual labor school for poor white children of the county: *Kinnaird v. Miller*, 25 Gratt. 107; to a lodge of freemasons, for the good of the craft, or for the relief of indigent and distressed worthy masons, their widows and orphans: *Duke v. Fuller*, 9 N. H. 538. See *Indianapolis v. Grand Lodge*, 25 Ind. 518; *Babb v. Reed*, 5 Rawle 151; *Gorman v. Russell*, 14 Cal. 535; *Thomas v. Ellmaker*, 1 Clark (Pa.) 502; *Swift v. Beneficial Soc.*, 73 Penn. St. 362; *Blenon's Estate*, Brightly (Pa.) 338; *Everett v. Carr*, 59 Me. 325; *King v. Parker*, 9 Cush. 71; *Vander Volgen v. Yates*, 3 Barb. Ch. 242.

Some cases, however, hold similar bequests invalid, on the ground of uncertainty: *Kendall v. Granger*, 5 Beav. 300; *Attorney-General v. Fishmongers*

Co., 2 Id. 151; *Ewen v. Bannerman*, 2 Dow. & Cl. 74; *Lyons v. East India Co.*, 1 Moo. P. C. 175; *Thompson v. Thompson*, 1 Coll. 392; *Heath v. Chapman*, 2 Drew. 417; *Limbrey v. Gun*, 6 Madd. 151; *Flint v. Warren*, 11 Jur. 665; *Beall v. Drane*, 25 Ga. 430; *Lepage v. McNamara*, 5 Iowa 124; *Trippe v. Frazier*, 4 Harr. & J. 446; *Dashiell v. Attorney-General*, 5 Id. 392; 6 Id. 1; *Wilderman v. Baltimore*, 8 Md. 551; *Needles v. Martin*, 33 Id. 609; *Goodrich's Case*, 2 Redf. 45; *Gallego v. Attorney-General*, 3 Leigh 450; *Heiss v. Murphey*, 40 Wis. 276; *Beekman v. Donsor*, 23 N. Y. 298; *Owens v. Missionary Society*, 14 Id. 380; *State v. Prevett*, 20 Mo. 165; *White v. Fisk*, 22 Conn. 31; *Literary Fund v. Dawson*, 10 Leigh 147; *Ayres v. Methodist Church*, 3 Sandf. 351; *Barnes v. Barnes*, 3 Cranch C. C. 269; *Morse v. Carpenter*, 19 Vt. 613; *Taylor v. Keep*, 2 Bradw. 368; *Janey v. Latane*, 4 Leigh 327. See further, *Loscombe v. Winttingham*, 13 Bear. 89, note; *Nichols v. Allen*, 130 Mass. 211.

JOHN H. STEWART.

Supreme Court of Pennsylvania.

JONES v. JONES.

Where a grantor is shown to be insane on a particular subject, or with reference to a particular person, and the deed is an act referable to that state of mind, no more need be proved in order to vacate the deed. In such a case the rule of equity that a grantor must be proved to have been of unsound mind or under undue influence at the very time the deed impeached was executed, is not applicable.

It is sufficient to invalidate any instrument executed for an inadequate consideration by a person of weak intellect, to show that the person in whose favor it was executed held a situation of confidence with respect to the maker of such instrument.

Where a grantee sustaining intimate confidential relations to the grantor, claims that the consideration of a deed to her consists in part of indebtedness of the grantor to her on account of loans of money made by her to the grantor, the burden of proof is upon such grantee to prove herself possessed of funds with which to make such loan.

APPEAL of Fannie Lee Townsend Jones from a decree of the Common Pleas No. 4, of Philadelphia county.

Bill in equity by John Sidney Jones, a lunatic, by his committee, Michael Arnold, complainant, against Fannie Lee Townsend Jones, defendant, praying for a reconveyance of a certain tract of land in the city of Philadelphia, from defendant to complainant.

An answer was filed, and the case referred to an examiner and afterwards to a master, by whom the facts were found to be as follows:

The complainant, John Sidney Jones, was a carpet dealer, in prosperous circumstances. Sometime prior to 1852 he became acquainted with Fannie Lee Townsend (the respondent) at a labor reform congress, and brought her to Philadelphia, fitting up a room

over his store for her, where she lived, and employing her at a salary of \$6 per week to edit a radical paper called the "Jubilee." The testimony clearly showed that she at once gained an enormous influence over him, so much so that he spoke of her as being endowed with superhuman and even divine qualities. The effect upon his business was immediately felt, and ended in business difficulties. His wife was shown to have begged him to discontinue his relations with respondent, and failing to so induce him, to have finally, in 1852, died (in the opinion of the witnesses) of a broken heart. After the death of his wife, Jones cohabited with the respondent as his wife.

Jones seems to have been at all times a man of marked peculiarities. He gave expression to opinions that property in land should be limited to the right of temporary occupancy; that men should live in boats upon the water, and that he with the respondent would start a bank called the "Argonautic Bank," to furnish the capital for the purpose. During his connection with the respondent he spoke of her as one who could do no wrong, and yielded to her every expressed wish.

In 1856 proceedings *de lunatico* were begun against Jones, but were not carried to completion. In 1873 proceedings were again instituted, and on March 20th 1873, he was found to be a lunatic, and incapable of managing his estate, and further that he had been so, with lucid intervals, for twenty years.

In 1861, while respondent was living with him as his wife, Jones, for a consideration of \$200, conveyed the premises in question to the respondent, "under and subject nevertheless to such judgments and mortgages as may be upon the premises." At the time of the conveyance the premises were worth about \$5000; the encumbrances were partially discharged by the committee.

In 1867 the house on the land was destroyed by fire, the title and the policy of insurance both being at that time in the name of the respondent. The amount of the insurance was \$4000, and was claimed by respondent on the ground that Jones was her debtor, and that the property had been conveyed to her as security for the debt. The matter was finally compromised by each party taking one-half of the money, respondent then agreeing to reconvey the property to a nominee of Jones; this she subsequently declined to do.

Before the examiner, the respondent testified (under objection as

to competency) that she had some money in savings banks and saved some from time to time in doctoring, writing and speculating. Her son by a former marriage also testified that his mother had money in her possession before her marriage with Jones.

On the other hand it was shown that Jones had, in the presence of different persons, asserted that she was a "beggar" when she came to him, and that she had robbed him of his property.

The witnesses present at the execution of the deed in question and the counsel under whose instructions it was drawn testified that Jones was of sound mind, and thoroughly understood the nature of the transaction, but the testimony of the witnesses on the part of the complainant was to the contrary.

The master reported a decree in favor of the complainant. Exceptions were filed which, after argument, were overruled by the court below, which entered a decree in accordance with the prayer of the bill. The respondent thereupon took this appeal assigning for error the decree of the court.

G. Morgan Eldridge, Francis E. Brewster and F. Carroll Brewster, for appellant.

W. W. Ker and Richard Vaux, for appellee

The opinion of the court was delivered by

SHARSWOOD, C. J.—It is not a rigid rule in equity, that a grantor must be proved to have been of unsound mind or under undue influence at the very time the deed impeached was executed. If it be shown that he was insane on a particular subject, or with reference to a particular person, and the deed is an act referable to that state of the mind, no more is needed. A man may be of perfectly sound mind on all subjects but one, a shrewd man of business, able to make contracts, no one in ordinary intercourse seeing or suspecting that anything was wrong, but touch him on a particular subject and it is at once recognised that he is a madman. The section of Dr. Ray's treatise on the Medical Jurisprudence of Insanity on Partial Intellectual Mania, p. 155, is a very curious and instructive one. John Sidney Jones was a madman of this character. The evidence clearly shows that during a considerable period of his life, comprising the time of the execution of the deed in question, and many years before and after, he was decidedly the subject of an insane hallucination in regard to the appellant. He regarded

her as a most extraordinary woman, even believing her to be a divine person. She could say or do or wish nothing which was wrong. The evidence makes this out clearly. The consequence was, that her influence over him was unbounded. She seems to have got from him whatever bonds or notes she wanted. She testifies that it was for money loaned by her to him. Where did she get this money? She says, "I had about \$6000 of my own money at the time I was married; I let the General have as much of it as \$4000 I could not say exactly \$4000, between \$4000 and \$5000. The money that I let the General have was my own money, independent of him." Where did it come from? It could be very clearly shown, or at least explained. Her son says, "I am aware that previous to my mother's marriage to General Jones she had some means, from the fact that she sent me from the East a large remittance, which I retained until she desired it, and then paid it to her. I heard in the family that she inherited property from her father and mother's estate." If she had this large amount of money when she first became connected with General Jones, where was it? In bank, in a strong box, in bonds, mortgages, stocks or loans? We are not informed. The facts of the case, as testified by herself, seem inconsistent with it: "When I was married to General Jones he fed me, but I bought my own clothes. I occasionally earned some money in various ways, doctoring, writing, speculating, buying and selling merchandise, jewels and ornamental things. One time I speculated in a piano. She had for editing the paper called the "Jubilee" \$6 a week, and a room to occupy as an office and a room to sleep in. She adds, "I had my money in the National Trust Company at the corner of Walnut and Third streets; I said what I had in the city of Philadelphia I had in that bank. I had some money in a savings bank in Providence. I had about \$600 there. I removed it from that bank, I think, about 1858, but can't recollect the year. I kept it by me for a good while. I think I put part of it in the Old Savings Bank in Walnut street above Third street." Her account with the National Trust Company is in evidence, beginning October 1852, a considerable number of small deposits only, only one over \$100, and her balance at the end of the year was \$474. The next year showed a balance of \$576, which remained to her credit. The balance, \$851.75, she withdrew April 4th 1855. She began again January 1856, with a deposit of \$1200, which, with several small deposits, she

had withdrawn by November of the same year. It is unnecessary to follow these accounts further. It is hardly necessary to say that they fail to make out a case. The able and elaborate argument of the learned counsel for the appellant failed to convince us that there was any consideration for the deed in question. As the learned president in the court below remarked, in his opinion, "it may be doubted whether, during the time of these transactions, she ever had any property at all, except what she received from John Sidney Jones." Under the circumstances of this case, his mental hallucination in regard to her, the onus was upon her to make out this clearly. The deed in question she at one time alleged to have been merely as security for loans. She received by compromise \$2000 of the insurance money on the property, and the evidence certainly is that she received that money as a full settlement of all her claims, and agreed to reconvey the property. Whether she ever was formally married to General Jones or not, she certainly occupied a very intimate confidential relation to him; and it is settled beyond controversy by the authorities cited in the opinion of the learned president of the court below, that it is sufficient to invalidate any instrument, executed for an inadequate consideration by a person of weak intellect, to show that the person in whose favor it is framed held a situation of confidence with respect to the maker of such an instrument.

Decree affirmed, and appeal dismissed at the costs of the appellant.

Where a deed or other contract is sought to be set aside on the ground of the insanity of the maker, no fraud or undue influence being alleged, the test is, had the maker sufficient mind to comprehend, in a reasonable manner, the nature and effect of what he was doing? If he had, the instrument is valid, if he had not, it is voidable: *Blakeley v. Blakeley*, 33 N. J. Eq. 502. *Ball v. Mannin*, 3 Bligh (N. S.) 1; s. c. *Smith & B.* 183; 1 *Dow & C.* 380; *Dennett v. Dennett*, 44 N. H. 531; *Young v. Stevens*, 48 Id. 135; *Bond v. Bond*, 7 Allen 1; *Somers v. Pumphrey*, 24 Ind. 231; *Hovey v. Chase*, 52 Me. 304; *Hovey v. Hobson*, 55 Id. 256; *Darby v. Hayford*, 56 Id. 246. *Coleman v. Frazer*, 3 Bush (Ky.)

300; *Carpenter v. Carpenter*, 8 Id. 283; *Crowther v. Rowlandson*, 27 Cal. 381; *Miller v. Craig*, 36 Ill. 110; *Baldwin v. Dunton*, 40 Id. 188; *Clearwater v. Kimler*, 43 Id. 272; *Sheldon v. Harding*, 44 Id. 68; *Wiley v. Ewalt*, 66 Id. 26; *Aiman v. Stout*, 42 Penn. St. 123; *Noel v. Karper*, 53 Id. 97; *Lozeau v. Shields*, 23 N. J. Eq. 509; *Dicken v. Johnson*, 7 Geo. 491; *Tolson v. Garner*, 15 Mo. 498; *Burnham v. Mitchell*, 34 Wis. 136.

Mere weakness of mind does not, in the absence of fraud, imposition or undue influence, disable a man from conveying property, if the capacity remains to see things in their true relations, and to form correct conclusions. If, however, the mind is so impaired that the

memory cannot recall the necessary facts, nor the judgment be exercised in drawing just conclusions, the power of disposing of property is gone: *Dennett v. Dennett*, *supra*. See also *Miller v. Craig*, *supra*; *Aiman v. Stout*, *supra*; *Simonton v. Bacon*, 49 Miss. 582; *Henderson v. McGregor*, 30 Wis. 80; *Cain v. Warford*, 33 Md. 23; *Cadwalader v. West*, 48 Mo. 483; *Killian v. Badgett*, 27 Ark. 166; *Maddox v. Simmons*, 31 Geo. 528; *Fornam v. Brooks*, 9 Pick. 212; *Wilson v. Oldham*, 12 B. Mon. 60; *Osmond v. Fitzroy*, 3 P. Wms. 130.

It seems clear upon principle and it is accordingly held that the unsoundness of mind requisite to vitiate a contract must exist at the time of making the contract: *Crouse v. Holman*, 19 Ind. 39; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283; *Staples v. Wellington*, 58 Me. 453; *Stewart v. Redditt*, 3 Md. 81. Not only must the insanity exist at the time of making the contract, but the contract, when sought to be set aside on the ground of insanity alone, whether general or partial, must be shown to be the offspring of mental disease: *Blakeley v. Blakeley*, *supra*; *Wray v. Wray*, 32 Ind. 126; *Staples v. Wellington*, *supra*. Monomania in no way connected with the subject of the contract will not vitiate it: *Boyce v. Smith*, 9 Gratt. 704; 1 Redf. on Wills 85. See also, *Dew v. Clark*, 1 Addams 279; 3 Id. 79; *Lemon v. Jenkins*, 48 Geo. 313.

Where, however, it appears in proof that a person was at any given time of unsound mind (unless from some temporary or transient cause), the legal presumption is, that that state of mind continues until the contrary is made to appear by evidence. But to have this effect, such unsoundness must be habitual: *People v. Francis*, 38 Cal. 183; *Crouse v. Holman*, 19 Ind. 39; *Dicken v. Johnson*, 7 Geo. 484; *Haynes v. Sicann*, 6 Heisk. 560; *Thornton v. Appleton*, 29 Me. 300; *Trish v. Newell*, 62 Ill. 196; *Armstrong v. Timmons*, 3 Harrington 345; *Corbit v. Smith*, 7 Iowa 60; *Wray v.*

Wray, 33 Ala. 187; *Cook v. Cook*, 53 Barb. 180; *Carpenter v. Carpenter*, 8 Bush 283. Where the diseased condition of mind is temporary, continued insanity or want of capacity is never presumed: *Carpenter v. Carpenter*, *supra*; *State v. Reddick*, 7 Kan. 151; *People v. Francis*, *supra*; *Staples v. Wellington*, *supra*.

In the principal case upon the proceedings *de lunatico inquirendo*, it was found that the grantor was a lunatic and incapable of managing his estate, and further, that he had been so, with lucid intervals, for twenty years. After general insanity is shown to exist in order to establish the validity of an act alleged to have been done in a lucid interval, the proof of such lucid interval must be clear: *In re Gangwere's Estate*, 14 Penn. St. 417; *Dodge v. Meech*, 1 Hagg. Ecc. 620. And it is not sufficient that there is evidence of sanity before and after the day on which the act was done, there being no presumption that a lucid interval will continue: *Harden v. Hays*, 9 Penn. St. 151. It cannot, therefore, be claimed that the act in question in the principal case was done in a lucid interval, even though there was no direct evidence of the existence of insanity at the time the deed in question was executed. The presumption of the continuance of insanity once shown to exist would, in the absence of opposing evidence, be sufficient evidence of the existence of insanity at the time of the execution of the deed. And even if there were no such presumption, proof that the deed was referable to the precedent insane state of mind, seems clearly sufficient to establish the continued existence and influence of such state of mind. Independently, therefore, of the other points in the case, as to the correctness of the decision of which there can be no question, the decision of the court upon the question of insanity involved in the case seems to be unquestionably correct.

MARSHALL D. EWELL.

Chicago.

United States Circuit Court, District of Massachusetts.

CHARLES LARNED v. LAROE F. GRIFFIN.

Parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, and this protection extends to parties and witnesses attending before arbitrators, commissioners or examiners.

This privilege can be enforced by plea in abatement.

The privilege is not waived either by submitting to the arrest and giving a bail bond or by filing an answer to the merits with the plea of abatement.

DEMURRER to plea in abatement. The facts are sufficiently stated in the opinion which was delivered by

COLT, J.—In this case it appears that the defendant was arrested while in Boston, Massachusetts, in attendance before a commissioner acting under a commission issued out of the Superior Court for Cook county, Illinois, to take the depositions of certain witnesses in a case pending in that court between the same parties, and for the same cause of action as this suit. The defendant submitted to the arrest and gave bail. The suit was first brought in the State court, and afterwards duly removed here. The only question now before the court, is whether the plea in abatement, setting up the privilege of the defendant from arrest can be sustained. To decide this, we must determine, 1st, whether the defendant was privileged from arrest at the time; 2d, whether his remedy can be enforced by a plea in abatement; 3d, whether submitting to the arrest and giving a bail bond, is a waiver of the privilege; 4th, whether answering to the merits is a waiver of the plea in abatement.

It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning: *Thompson's Case* 122 Mass. 428; *In re Healey*, 53 Vt. 694; *Huddeson v. Prizer*, 9 Phila. 65; *Ex parte Hurst*, 1 Wash. C. C. 186; *Juneau Bank v. McSpedan*, 5 Bis. 64. *Bridges v. Sheldon*, 7 Fed. Rep. 17, 43; *Person v. Grier*, 66 N. Y. 124; Bacon's Ab., *Privilege*, B. 2; *Meekins v. Smith*, 1 H. Black. 636; 1 Greenl. on Ev., § 316.

And this protection extends to the attendance of parties and witnesses before arbitrators, commissioners and examiners: *Spence v. Stuart*, 3 East 89; *Arding v. Flower*, 8 D. & E. 534; *San-*

ford v. Chase, 3 Cow. 381; *United States v. Edme*, 9 S. & R. 147; *Huddeson v. Prizer*, 9 Phila. 65; *Wetherill v. Seitzinger*, 1 Miles 237; *Bridges v. Sheldon*, 7 Fed. Rep. 17, 43; 1 Greenl. on Ev., § 319.

It is clear, therefore, that the defendant was privileged from arrest at the time it was made. But whether his remedy is by plea in abatement, is less free from doubt. Under the old English rule, this immunity was taken advantage of by writ of privilege. "The only way by which courts of justice could anciently take cognisance of privilege of parliament, was by writ of privilege, in the nature of a supersedeas to deliver the party out of custody when arrested in a civil suit. But, since the Statute of 12 Wm. III., c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular, *ab initio*, and that the party may be discharged upon motion:" 1 Black. Com. 166.

The more modern way in England has been to raise the question either by motion or by plea in abatement: *Pitt's Case*, 3 Stra. 985; *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Meekins v. Smith*, 1 H. Bl. 636; *Randall v. Gurney*, 3 B. & Ald. 252; Com. Dig., *Abatement*, D. 6; 1 Chit. Pl. 443; *Davies v. Rendlesham*, 7 Taunt. 679.

In this country, the right of privilege has been brought before the court in three ways. By motion: *Ex parte Hurst*, 1 Wash. 186; *Lyell v. Goodwin*, 4 McLean 29, 41; *Juneau Bank v. McSpedan*, 5 Bis. 64; *Sanford v. Chase*, 3 Cow. 381; *Seaver v. Robinson*, 3 Duer 622; *Harris v. Grantham*, Coxe (N. J.) 142; *Starrett's Case*, 1 Dall. 356; *Hammerskold v. Rose*, 7 Jones (Law) 629; *Hunter v. Cleveland*, 1 Brev. 168; *Henegar v. Spangler*, 29 Geo. 217. By *habeas corpus*: *Ex parte M'Neil*, 6 Mass. 245; *Wood v. Neale*, 5 Gray 538; *May v. Shumway*, 16 Id. 86; *Richards v. Goodson*, 2 Va. Cases 381. By plea in abatement: *King v. Coit*, 4 Day 129; *Case v. Rorabacher*, 15 Mich. 537; *Julio v. Bolles*, 22 Law Rep. 354; *Gilbert v. Vanderpool*, 15 Johns. 242; *Anderson v. Rountree*, 1 Pin. (Wis.) 115; *Chaffee v. Jones*, 19 Pick. 261, 265; *Hoppin v. Jenckes*, 8 R. I. 453. It is contended by the plaintiff that the common-law privilege of suitors and witnesses never extended so far as to abate the suit, however different the rule may be in case of members of parliament, ambassadors and attorneys.

Anciently, it would seem in all cases of privilege, the super-sedeas which was granted upon a writ of privilege, only operated to deliver the party out of custody, and he was still held upon common bail: *Long's Case*, 2 Mod. 181; *Pitt's Case*, 2 Stra. 987; 1 Black. Com. 166. But after the Statute of 12 Wm. III., c. 3, it was decided in *Col. Pitt's Case*, 2 Stra. 987, that members of parliament, or those entitled to privilege of parliament, should be discharged absolutely, and not upon common bail: See also, *Cassidy v. Stuart*, 12 Ad. & E. 450. The rule, however, with respect to suitors and witnesses, was still maintained, that while the arrest would be set aside, common bail must be filed the suit did not abate: *Cameron v. Lightfoot*, 2 W. Bl. 1190.

The early decisions in this country are not harmonious. In some of the older cases, the rule was followed that the privilege of suitors and witnesses extends no further than exemption from arrest, that service by summons is legal, and that in cases of arrest common bail must be filed, or a general appearance entered: *Blight v. Fisher*, Peters C. C. 41; *Hunter v. Cleveland*, 1 Brev. 168; *Taft v. Hoppin*, Anthon N. P. 187; *Booraem v. Wheeler*, 12 Vt. 311; and the more recent case of *Bishop v. Vose*, 27 Conn. 1.

In other cases, however, we find the right extended, and a more complete protection afforded suitors and witnesses, the discharge from arrest being absolute, and service by summons held illegal: *Hayes v. Shields*, 2 Yeates 222; *Miles v. McCullough*, 1 Binn. 76; *United States v. Edme*, 9 S. & R. 147; *Norris v. Beach*, 2 Johns. 294; *Sanford v. Chase*, 3 Cow. 381; *Harris v. Grantham*, 1 Cox 142.

Whatever may have been the earlier view, we have no doubt that the tendency in this country has been to enlarge the right of privilege so as to afford full protection to suitors and witnesses from all forms of process of a civil character during their attendance before any judicial tribunal, and for a reasonable time in going and returning. Let us pursue the subject a little further. The case of *Blight v. Fisher*, Pet. C. C. 41, decided in 1809, by Justice WASHINGTON, holding that a service of summons upon a witness is good, is distinctly overruled in the later case of *Parker v. Hotchkiss*, 1 Wall. Jr. 269, the court stating that the opinion met with the approval of Chief Justice TANEY and Justice GREER. See also the elaborate opinion in *Lyell v. Goodwin*, 4 McLean 29, to the effect that a judge about to start on his circuit is not liable to be served with

summons, his privilege being as extensive as that of a suitor or witness, or juror of the court. The same view is expressed in *Juneau Bank v. McSpedan*, 5 Bis. 64; *Bridges v. Sheldon*, 7 Fed. Rep. 17, 43.

In the earlier cases in New York a distinction was taken between resident and non-resident suitors and witnesses. In the case of non-residents, an absolute discharge was granted: *Norris v. Beach*, 2 Johns. 294. But in the case of residents, common bail had to be given: *Bours v. Tuckerman*, 7 Johns. 538.

Referring to these two decisions in *Sanford v. Chase*, 3 Cowen 381, the court observe, "We adopt the first case; the privilege of a witness should be absolute." In the recent case of *Person v. Grier*, 66 N. Y. 124, the court declare that any distinction between residents and non-residents is doubtful, and the broad ground is taken that this immunity is one of the necessities of the administration of justice, and that courts would often be embarrassed if suitors or witnesses while attending court could be molested with process: *Seaver v. Robinson*, 3 Duer 622; *Merrill v. George*, 23 How. Pr. 331.

The case of *Taft v. Hoppin* (1816), Anthon 187, which decided that the defendant, a non-resident suitor, should be held upon common bail, was rendered at Nisi Prius, and in view of the prior case of *Norris v. Beach*, 2 Johns. 294, and of the subsequent decisions in the highest court of the state, it can hardly be deemed authority.

In Pennsylvania, from an early period complete immunity seems to have been extended to suitors and witnesses: *Miles v. McCullough*, 1 Binn. 77; *Hayes v. Shields*, 2 Yeates 222; *United States v. Edme*, 9 S. & R. 147; *Holmes v. Nelson*, 1 Phila. 217. "It is alike the privilege of the person and the privilege of the court. It renders the administration of justice free and untrammelled, and protects from improper interference all who are concerned in it," say the court in *Huddeson v. Prizer*, 9 Phila. 65.

In New Jersey, also, a full discharge is granted: *Harris v. Grantham*, 1 Cox 142.

In Massachusetts it was held by Judge MORTON in *Julio v. Bolles*, 12 Law Rep. 354, that a foreign witness was protected from summons. In that case a plea in abatement had been filed which was demurred to by the plaintiff. In overruling the demurrer, the learned judge observes, "If this service was illegal, the jurisdiction fails, and the writ should be abated."

In Vermont, we are referred by plaintiff's counsel, to the case of

Booraem v. Wheeler, 12 Vt. 311, which holds a plea in abatement bad in the case of a witness arrested while attending court; the court maintaining that it has never been held that a man's property may not be attached, or he be served with a summons while attending court as a witness or suitor; what is wanted is that the suitor or witness may give uninterrupted attendance at court; that this object is not secured by abating the writ, for the question may not be heard until long after the court he was attending had closed its session; the legal object can be, and always has been better secured by the summary proceeding of a motion to the court to release the person for the time being or by *habeas corpus*.

But the views here expressed of the extent of the privilege of suitors or witnesses, are clearly inconsistent with the later case in Vermont of *In re Healey* (1881), 53 Vt. 694, which declares a service by summons upon a witness to be illegal. The court, citing *Person v. Grier*, 66 N. Y. 124, and other cases, remark, "In the case of a non-resident suitor or witness, the weight of authority is to the effect that the immunity is absolute from the service of any process, unless the case is exceptional." And it is further declared that if the writ had been made returnable to that court it would have been dismissed upon motion; the court would not have taken jurisdiction of a party whose rights were thus invaded, for to do so would be in effect a withdrawal of the shield and protection which the law uniformly gives to witnesses.

Whether this plea in abatement shall be sustained or not, turns upon the view taken of the extent and character of the privilege to which suitors and witnesses are entitled. If we adopt the older and narrower view, that this is wholly the privilege of the court rather than of the suitor, and therefore a question of judicial discretion rather than of personal right; and further, that while the offender may be punishable for contempt, if the arrest is made in the actual or constructive presence of the court, still the suitor or witness can only ask to have the arrest set aside upon giving common bail, or entering a general appearance, then the suit does not abate, and the present plea is bad.

But if we adopt the broader rule, which it appears to us is clearly warranted by the more recent decisions in the federal and state courts, and which in our opinion is necessary to the due administration of justice, that this immunity extends to all kinds of civil process, and affords an absolute protection, then we see no good reason why a plea in abatement is not proper here, as in other cases of

privilege where an absolute discharge is granted, and where the plea is held good (see authorities before cited).

The plaintiff contends that the defendant submitted to the arrest, made application to give bail, and entered into a bond, and that this constitutes a waiver of his privilege. We do not think this sound, though we are aware that some cases seem to point in this direction: *Fletcher v. Baxter*, 2 Aiken (Vt.) 224; *Brown v. Getchell*, 11 Mass. 11, 14.

The question, however, was directly passed upon in *United States v. Edme*, 9 S. & R. 147, 149, and it was there decided that the giving of a bail bond is so far from waiving the privilege, that the court when they discharge will order it to be delivered up and cancelled. It is not esteemed any good ground for presuming a waiver of privilege from arrest, because the person takes the ordinary and most expeditious mode of freeing himself from arrest:” REDFIELD, J., in *Washburn v. Phelps*, 24 Vt. 506.

It appears in this case that an answer to the merits was filed with the plea in abatement; it has been decided that in Massachusetts the validity of neither is affected by their being pleaded together, and that the plea in abatement is not thereby waived: *Fisher v. Fraprie*, 125 Mass. 472; *O’Loughlin v. Bird*, 128 Id. 600.

Upon the whole we are of the opinion that the plea in abatement should be sustained. Action dismissed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ILLINOIS.²

SUPREME COURT OF MISSOURI.³

SUPREME COURT OF NEW JERSEY.⁴

SUPREME COURT OF VERMONT.⁵

ADMIRALTY.

Collision—Damages, Measure of—Partial Insurance—Recovery of Half Damages.—Upon a libel for collision libellant may be allowed

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

² From Hon. N. L. Freeman, Reporter; to appear in 103 Illinois Reports.

³ From T. K. Skinker, Esq., Reporter; to appear in 75 Missouri Reports.

⁴ From G. D. W. Vroom, Esq., Reporter; to appear in vol. 15 of his Reports.

⁵ From Edwin F. Palmer, Esq., Reporter; to appear in 54 Vermont Reports.

damages for the loss of the use of his vessel while undergoing repairs, and if at the time of the collision she was in no need of repair, and was engaged in and peculiarly fitted for a particular business, and her charter value cannot be otherwise satisfactorily ascertained, the average of the net profit of her trips for the season may be adopted as the measure of the allowance: *Steamboat Potomac v. Cannon*, S. C. U. S., Oct. Term 1881.

A vessel being insured on two-thirds of her valuation by valued policies, by which in case the insurers should pay any loss the assured agreed to assign to them all right to recover satisfaction from any other person, or to prosecute therefor at the charge and for the account of the insurers if requested, and that they should be entitled to such proportion of the damages recovered as the amount insured bore to the valuation in the policies, the assured filed a libel in admiralty against another vessel for damages by collision. The insurers paid the libellant two-thirds of that damage, and released and assigned to the owners of the libelled vessel all their right in any damages growing out of the collision. It appearing that the collision resulted from mutual fault, only half damages were allowed. *Held*, that one-third of the sum paid by the insurers must be deducted from the amount to be recovered: *Id.*

AGENT.

Power to employ Sub-agent—Secret Agreement with Adverse Party.—An agent to sell has no implied power to bind his principal by an agreement to pay another commissions for making sales: *Atlee v. Fink*, 75 Mo.

A dealer in lumber agreed to pay to a builder, who was employed to superintend the erection of buildings for others, and whose duty it was to pass upon accounts presented for materials furnished, but not to make purchases, a commission on all sales of lumber made to the builder's employers through his influence. This agreement was not made known to the employers. *Held*, that it was against public policy and void: *Id.*

ATTORNEY.

Joint Employment—Partnership—Division of Fees.—Attorneys undertaking jointly the defence of a suit at law, become, as to that case, special or limited partners. In the absence of agreement to the contrary, they will be entitled to share equally in the compensation, and it does not matter that one may do more of the work than the other. This will not entitle him to charge as for extra services. Nor will he have any remedy against the other, by dissolution of the partnership or otherwise, for failure to perform his full duty: *Henry v. Bassett*, 75 Mo.

Power to Compromise.—An attorney, without special authority, has no power to bind his client by a compromise or settlement of the cause of action unless he receives the full amount of his client's claim in money; and this is so though the client lives in another state: *Granger v. Batchelder*, 54 Vt.

Stipulation as to Amount of Fee—Subsequent Allowance of Attorney Fee—Costs.—When there is an express agreement between solicitor and client, whereby the solicitor undertakes to do certain services respect-

ing the client's interest in an estate for a certain sum stipulated to be paid by the client, and in the performance of the duty so undertaken the solicitor takes proceedings in the client's behalf in the Court of Chancery, which result in settling the estate and severing and securing the client's share, and entitle him, under the agreement, to the specified compensation; in an action therefor the client ought to be credited with a sum allowed by the chancellor to the solicitor in the proceedings in chancery out of the general fund of the estate, when it appears that the services rendered by the solicitor in those proceedings were such as were included in his contract with his client: *Shreve v. Freeman*, 15 Vroom.

BANK. See *Taxation*.

BILLS AND NOTES. See *Receiver*.

Note given for Fraudulent Claim—Consideration.—A note given to settle a fraudulent claim, one wholly without foundation, and known by both parties to be such, under threats of suit, is without consideration and void; and cannot be collected by a third party, though purchased before due, when such party was not only put upon inquiry, but also acted in bad faith in buying, he being a general purchaser of the payee's notes and knowing his dishonest methods in obtaining them: *Ormsbee v. Howe*, 54 Vt.

Transfer without Endorsement—How Suit brought by Transferee.—If a note payable to order be not endorsed by the transferrer, the holder cannot sue in his own name, for, although the holder may possess the entire beneficial interest, the legal title is still outstanding in the transferrer, and his name should be used to maintain the suit: *State v. High Bridge M. E. Church Assoc.*, 15 Vroom.

If no endorsement be on a note payable to order, and it does not appear on the face of the note that the payee is agent of plaintiffs, the suit cannot be maintained in their name: *Id.*

Signature of Officer of Company—When it does not create Individual Liability—Practice—Denial of Signature.—A bill of exchange headed "Office of Belleville Nail Mill Co.," and concluding "charge same to account of Belleville Nail Mill Co., A. B., Pres't., C. D., Sec'y.," is the bill of the company, and the officers signing are not individually liable: *Hitchcock v. Buchanan*, S. C. U. S., Oct. Term 1881.

A statute prohibiting defendants in actions upon written instruments from denying their signatures except under plea verified by affidavit, does not apply to a case in which the defendants demur because the instrument declared on appears upon its face to be the contract of their principal and not of themselves: *Id.*

CONSTITUTIONAL LAW.

Grant of right of Taxation—Power to Repeal—What amounts to Repeal.—A special law authorized the township of North Brunswick to convey to the city of New Brunswick a poor-farm owned by the former, and situate within its limits, and declared that the farm should be liable to taxation by the township so long as it should be embraced within it; and under this law the conveyance was made: *Held*, that the legislature could, constitutionally, repeal this power of taxation: *State v. Williamson*, 15 Vroom.

A declaration in a general law that all acts or parts of acts, whether local or special, or otherwise, inconsistent with its provisions, are repealed, will repeal inconsistent provisions in prior special acts : *Id.*

CONTRACT. See *Agent*.

Illegal Contract—Guarantee on not enforceable.—Where a bank charter contains a clause that no director of the corporation shall be indebted to it, either directly, or indirectly, at any time, to an amount greater than seventy-five per cent. of the capital stock held by him in good faith as his own, and a director has become indebted to the bank in excess of such sum, a note given by him to the bank for a further sum will be illegal and void, and any guaranty of a third person of its payment, being in aid and furtherance of such illegal contract, will be equally void, and no recovery can be had upon such guaranty, although the guarantor is not a director : *Workingmen's Banking Co. v. Rautenberg*, 103 Ill.

CORPORATION. See *Bills and Notes ; Partnership*.

COSTS. See *Attorney ; Errors and Appeals*.

Trust Estate—Litigation of one Cestui Que Trust for common benefit—Allowance of Costs out of Fund.—Where a large number of bonds issued by a corporation are secured by a trust fund which is being wasted or misapplied by the trustees, or which they refuse or neglect to apply to the payment of the bonds, a holder of a portion of such bonds who in good faith files a bill to secure the due application of the fund, and succeeds in bringing it under the control of the court is entitled to have his costs, counsel fees and necessary expenses of the litigation paid out of the fund : *Trustees of Int. Imp. Fund v. Greenough*, S. C. U. S., Oct. Term 1881.

Such complainant, however, is not entitled to an allowance for private expenses, such as travelling fares and hotel bills, nor for his time or personal services : *Id.*

The practice of allowing extravagant counsel fees and commissions to trustees, complainants, receivers and their counsel to be paid out of trust funds, commented on and disapproved : *Id.*

CRIMINAL LAW.

Passing Counterfeited Obligation—Sufficiency of Indictment—Allegation of Knowledge.—An indictment on sect. 5431, U. S. Rev. Stat., alleging in the words of the statute that the defendant, feloniously and with intent to defraud, did pass, utter and publish a falsely made, forged, counterfeited and altered obligation of the United States, but not further alleging that the defendant knew it to be false, forged, counterfeited and altered, is insufficient even after verdict : *United States v. Carll*, S. C. U. S., Oct. Term 1881.

DAMAGES. See *Parent and Child*.

Failure to pay Money—Interest.—The law assumes that interest is the measure of damages for failure to fulfil a contract to pay money, and, therefore, beyond the payment of such interest a city is not liable to its

creditor for damages caused by his pecuniary embarrassment consequent upon the failure of the city to meet its obligations to him: *London v. Tazing District of Shelby County, S. C. U. S.*, Oct. Term 1881.

DEBTOR AND CREDITOR.

Compromise—When not Binding—Fraud.—A compromise voluntarily made without any fraud or imposition will not be set aside, however disadvantageous it may be. But if a debtor fraudulently conceals his property, and by a false and fraudulent representation of his inability to pay, induces his creditor to compound his debt, the creditor will not be bound by the composition: *Ackerman v. Ackerman*, 15 Vroom.

Plaintiff recovered a judgment for \$4000; defendant transferred stock of which he was owner, the par value of which was \$11,000 or \$12,000, in trust for his wife, to put it beyond reach of execution on the judgment, and left the state. On representations by defendant that he had nothing to pay with, the plaintiff, without knowledge of the fraudulent transfer by the defendant of his property, was induced to sign a satisfaction-piece on payment of \$50, and the judgment was cancelled of record. *Held*, that the satisfaction-piece was procured by fraud and that the cancellation of record should be vacated: *Id.*

DISCOVERY. See *United States Courts*.

EQUITY.

Affirmative Relief on Answer.—Necessity of Cross-Bill.—Affirmative relief cannot be granted to a defendant in chancery upon his mere answer to the bill. To obtain such relief the defendant must file a cross-bill praying for the relief he seeks: *White v. White*, 103 Ill.

ERRORS AND APPEALS.

Decree for Costs—When a Final Decree—Payment out of Special Fund.—While in ordinary cases an appeal does not lie from a decree in equity for costs only, yet it does lie when the costs are directed to be paid not by a particular party but out of a fund under control of the court: *Trustees of Int. Imp. Fund v. Greenough*, S. C. U. S., Oct. Term 1881.

EVIDENCE.

Attempt to Influence a Witness.—On the trial of an action on the case, brought against a city railway company to recover for a personal injury, the court allowed a witness for the plaintiff to testify that a clerk in the employ of the defendant offered him \$300, either to prevent him from appearing as a witness against the company, or to influence his evidence in favor of the company. This was objected to as no part of the *res gestæ*. *Held*, that the evidence was proper, though not a part of the *res gestæ*: *Chicago City Railway Co. v. McMahon*, 103 Ill.

Location of Town—Judicial Notice.—The court will take judicial notice of the county in which an incorporated town is situated, and of the fact whether such county is under township organization: *People v. Suppiger*, 103 Ill.

Legislative Proceedings—Printed Journal.—The printed journals of Vol. XXX.—86

either house of a legislature, published in obedience to law, are competent evidence of its proceedings: *Amoskeag Nat. Bank v. Ottawa*, S. C. U. S., Oct. Term 1881.

FORMER RECOVERY.

Suit for Interest—When not a bar to subsequent Suit for Principal— Where a promissory note, running, according to the face of it, for several years, provides that the interest shall be payable annually, and "if the interest is not so paid the entire principal sum shall immediately become due and payable," the omission to pay the interest for a given year will not operate to render the annual interest thus accrued and unpaid, together with the principal sum, an entire demand, and a recovery for one year's interest will not operate as a bar to a subsequent suit for the interest accrued in the succeeding year: *Wehrly v. Morfoot*, 103 Ill.

FRAUD. See *Debtor and Creditor*.

GUARANTEE. See *Contract*.

GUARDIAN AND WARD.

Gift by Ward to Guardian—When Invalid.—The gift from a ward to a guardian is voidable; and the burden of proof is on the donee to show that the transaction was fair; that it was freely, voluntarily and understandingly made; and that the donor had competent and disinterested advice as to the subject-matter of the gift: *Wade v. Pulsifer*, 54 Vt.

The settlement and approval of the guardian's account by the Probate Court; the presence of the wards, their husbands and attorney on that occasion, it not appearing that the subject-matter of the gift was up for consideration; their receipts; their expression of approval of the accounts; their declarations that they did not regret the gifts; lapse of time; the death of the donee, and of one of the donors, do not affect the result; and the gifts are set aside: *Id.*

HUSBAND AND WIFE.

Ante-Nuptial Agreement—Proof of.—When a husband, under the statute, is entitled to a portion of his deceased wife's estate, unless debarred by an ante-nuptial agreement, it is incumbent upon her heirs to show that such agreement existed and was in force at the time of her decease, to prevent his taking according to the statute: *Graves v. Wakefield*, 54 Vt.

Though it may be a presumption that the ante-nuptial agreement now exists because it once existed, yet this may be overcome by the fact that no such agreement was ever found among the wife's papers: *Id.*

A married woman has the power to surrender an ante-nuptial agreement to her husband to be cancelled: *Id.*

Insane Husband—Right of Wife to Control.—A husband, who is insane without a guardian, but of full age, is under the control of his wife in opposition to that of his father; hence it was not a trespass for her agents and by her request to enter the father's dwelling against his protests and resistance, where certain rooms had been exclusively

assigned to the son and his wife for a temporary abode, and, in a careful and prudent manner, to remove the husband to some other place designated by the wife : *Robinson v. Frost*, 54 Vt.

The father's rights as natural guardian cease when the son arrives at full age, and are not restored by the son's insanity : *Id.*

Warrant of Attorney by Wife to confess Judgment—When valid.—If the contract of a married woman be such as a married woman is by law incapable of entering into, her warrant of attorney to enter judgment upon it is a nullity, and judgment entered thereon will be vacated. But if the contract be one that a married woman is able to make, and on which she may be sued at law by force of the Married Woman's Act, she may bind herself by a warrant of attorney for the confession of a judgment on such a contract, and the judgment entered in pursuance thereof will be good : *Heywood v. Shreve*, 15 Vroom.

INSOLVENCY.

Dividends from Estates of both Principal and Surety.—Amount of.—When a note is allowed by the commissioners against the insolvent estate of a deceased surety, and afterwards a dividend is paid on the note by the trustees of the insolvent principals, who have assigned, in the final distribution of such surety's estate by the Probate Court, the owner of the note is entitled to a dividend only on the balance, and not on the amount so allowed : *Lowell v. French*, 54 Vt.

INSURANCE.

Condition for Notice of other Insurance—Construction of.—A condition annexed to and made part of a policy of fire insurance, which provides that "all and every person insuring in this company must give notice * * * of any other insurance effected in their behalf on said property * * * in which case each office shall be liable to the payment only of a ratable proportion of any loss or damage which may be sustained," &c., is not restricted to other insurance effected prior to the execution and delivery of the policy in question. It is applicable to all other insurances, whether effected before or after the policy in question : *Warwick v. Monmouth County Fire Ins. Co.*, 15 Vroom.

INTEREST. See *Former Recovery*.

JURY.

Right of Challenge—Opinion formed by Juror.—The right of peremptory challenge is the right not to select, but to reject jurors ; hence, when one of the respondents peremptorily challenged a juror, and the other insisted that he was qualified and should sit in the trial, the court properly excused such juror : *State v. Meaker*, 54 Vt.

The formation and expression of an opinion are not alone the test of a juror's competency ; but the nature of the opinion may be inquired into ; and, if found to be only a transitory inclination of the mind, based upon rumor or newspaper report, &c., the truth of which the juror does not inquire, nor judge, it is not a disqualifying opinion. To work a disqualification there must be an abiding bias of the mind caused by substantial facts in the case, in the existence of which the

juror believes, an opinion upon the merits of the case upon the guilt or innocence of the accused of the charge laid in the indictment upon the evidence substantially as expected to be presented on trial : *Id.*

LIMITATIONS, STATUTE OF. See *Vendor and Vendee.*

LUNATIC. See *Husband and Wife.*

MASTER AND SERVANT.

Liability for Wrongful Act of Servant—Bribery of Witness by Servant.—Where a clerk of a city railway company, without authority, offers money to a witness to keep him from testifying against the company, or to influence his testimony, the company must be held responsible for his act, and it is proper evidence against the company: *Chicago City Railway Co. v. McMahon*, 103 Ill.

The master is liable for not only the careless and negligent acts, but also for the wilful and malicious acts of his servant while acting within the scope of his duty or employment. This rule is well recognised in this state : *Id.*

MORTGAGE. See *Possession.*

Mortgagee in Possession—Liability for Rents.—If a mortgagee enter into possession and then permits the mortgagor to take the profits or to use the mortgage to keep off other creditors, he will be required to account, at the suit of the latter, for the rents and profits for the time he is in possession. In the absence of fraud or neglect of duty he will be required to account for only such as are actually received : *Ely v. Turpin*, 75 Mo.

Purchase for Value—When Mortgage is.—The giving of further time for the payment of an existing debt is a valuable consideration, and is sufficient to support a mortgage as a purchase for a valuable consideration : *Cass County v. Oldham*, 75 Mo.

Railroad Bonds—Rights of Purchasers in Good Faith—Foreclosure-Sale—Redemption.—The rule that the holder of commercial paper, seeking to enforce in equity a mortgage security therefor, is subject to any defence which would be good against the mortgage in the hands of the mortgagee himself has no application to deeds of trust given to secure railroad coupon bonds intended to be thrown upon the market and circulated as commercial paper, and to be used as securities for permanent investments : *Peoria and Springfield Railroad Co. v. Thompson*, 103 Ill.

Where a railroad, its appurtenances and franchises, are mortgaged as a whole, there is no power or authority to sell them separately, and such property, taken as a whole, not being, strictly speaking, either real or personal estate, when sold on a decree of foreclosure is properly sold without any right of redemption. The rule is founded partly upon considerations of public policy : *Id.*

MUNICIPAL CORPORATION.

Power to do authorized Act by Resolution—Judgment of Commissioners of Assessment.—Where a common council is authorized to do an act, but the mode of doing it is not prescribed, it may be done by resolution as well as by ordinance : *State v. City of Passaic*, 15 Vroom.

The judgment of commissioners of assessment on matters of fact within their lawful cognisance will not be reversed except upon clear proof that it is erroneous : *Id.*

Trespass by City Officer.—If a city officer takes earth from private property and uses it in improving a street of the city without any provision in the charter or elsewhere authorizing such a proceeding, it is a trespass, for which the officer will be individually liable, but not the city : *Rowland v. City of Gallatin*, 75 Mo.

NEGOTIABLE INSTRUMENT.

Railroad Bonds—When issued for Money, Labor or Property—Construction of Constitutional Provision.—Where one, for a present consideration, in good faith purchases bonds or stocks in the regular course of business from a railroad company, and such consideration is accepted by the proper officer of the company, and nothing appears to show that it is to be used or applied to other than legitimate corporate purposes, such bonds or stocks, when thus issued, will be regarded as having been issued for money, labor or property "actually received and applied," within the meaning of a constitutional provision prohibiting the issue of bonds or stock except for such considerations : *Peoria and Springfield Railroad Co. v. Thompson*, 103 Ill.

NEGLIGENCE.

Railroad—Neglect of Statutory Duty—Evidence.—The omission to discharge any duty imposed by law upon common carriers in the management of their vehicles, in transporting persons and property, is negligence. The fact, therefore, that a railroad company's trainmen failed to ring the bell or sound the whistle as the train approached the crossing of a public road, may be given in evidence in a common-law action against the company for negligently killing plaintiff's steer at the crossing, without being specially pleaded : *Goodwin v. Chicago, R. I. and Pacific Railroad Co.*, 75 Mo.

It is not negligence *per se* to run a train at the rate of twenty-five miles an hour across a public road in the country : *Id.*

NOTICE. See Possession.

Record of Void Deed.—The record of a deed which is void for insufficiency of description, is not constructive notice, and will not put a stranger upon inquiry : *Cass County v. Oldham*, 75 Mo.

PARENT AND CHILD. See Husband and Wife.

Contract of Hiring—Measure of Damages—Right of Discharge—Evidence.—If a minor son hire himself out without the knowledge of his father, the father may either adopt the contract and claim whatever is due under it, or he may repudiate it and claim the value of his son's services. In the latter event, if it appears that the employer has permitted the son to use a part of his time for his own purposes, the measure of recovery will be the value of his entire time, less the value of the privilege so accorded to him : *Sherlock v. Kimmell*, 75 Mo.

If a father hire out his minor son for an indefinite period, the employer may discharge the son at any time without notice to the father : *Id.*

In an action by a father to recover wages due his minor son, statements made by the son are not admissible as evidence against the father: *Id.*

PARTNERSHIP.

Ownership of Stock in Corporation—Individual Liability of Partners as Stockholders.—Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution against himself individually, as a stockholder, upon the motion of a creditor of the corporation, in all cases where the firm would be subject to such liability: *Bray's Adm. v. Seligman's Adm.*, 75 Mo.

PATENT.

Specification—Sufficiency of—Evidence to explain—Combination of Devices—Priority as between two Inventors—Drawings—Pleadings.—A specification in letters-patent is sufficiently clear and descriptive when expressed in terms intelligible to a person skilled in the art to which the invention belongs: *Webster Loom Co. v. Higgins*, S. C. U. S., Oct. Term 1881.

Evidence is admissible to show the meaning of terms used in a patent as well as the state of the art: *Id.*

If an improvement of a well known appendage to a machine is fully described in a specification, it is not necessary to show the ordinary modes of attaching the appendage to the machine: *Id.*

Query—Whether the defence of insufficient description can be set up without alleging an intent to deceive the public? *Id.*

A new combination of well known devices producing a new and useful result (as that of greatly increasing the effectiveness of a machine) may be the subject of a patent: *Id.*

Of two original inventors the first will be entitled to a patent unless the other puts the invention into public use more than two years before the application for a patent: *Id.*

An invention relating to machinery may be exhibited as well in a drawing as in a model, so as to lay the foundation of a claim to priority, if sufficiently plain to enable those skilled in the art to understand it: *Id.*

Though the defence of prior invention ought to be set out in the answer, yet if the omission to set it out is not objected to at the proper time in the court below, it cannot be objected to in the appellate court: *Id.*

POSSESSION.

Notice of Rights under Unrecorded Deed or Mortgage.—Where a person is in possession of land under an unrecorded deed, that possession is notice to all subsequent purchasers or encumbrancers of whatever title is held by the person in possession, to the same extent as if his deed were duly recorded, and a subsequently acquired title, although first on record, will be held subject to the title which the person in possession may have to the property. This rule applies as well to possession held under an unrecorded mortgage: *Brainard v. Hudson*, 103 Ill.

PRACTICE. See *Bills and Notes.*

RAILROAD. See *Negligence*.

Liability for Negligence—Injury to Employee of another Road running Trains over its Track.—When one railroad company has a right by contract to run its trains over the track of another railroad company, the latter company is liable for injuries caused solely by the negligence of its own switchman in not properly attending to his duty, to an engineer of the former company while operating his engine on said track; and also to the other company for damage to its property: *In re Central Vt. Railroad Co.*, 54 Vt.

RECEIVER.

Securities taken for Unauthorized Loan—Right of Successor to Recover upon.—If a receiver loan trust funds without legal authority, and take a promissory note for security, the want of such legal authority is not a good defence in an action on the note, brought by a subsequently-appointed receiver, who holds it as part of the assets of the trust estate: *Corbin v. De La Vergne*, 15 Vroom.

SHERIFF'S SALE.

Who may Sue Purchaser on his Failure to Pay.—The sheriff who makes a sale under execution, alone can maintain an action against the purchaser for a breach of his contract of purchase. The sheriff, in making such sale, does not act as the agent of the creditor, but as an officer of the law in performing a legal duty: *People v. Stelle*, 103 Ill.

STATUTE. See *Constitutional Law*; *Trial*.

Construction by Usage.—A statute of uncertain meaning, which has been enforced in a certain sense for a long series of years by the different departments of government, will be judicially construed in that sense: *State v. Kelsey*, 15 Vroom.

TAXATION. See *Constitutional Law*.

Savings Banks—Exemption under Sect. 3408 Rev. Stat.—*All Deposits entitled to Benefit of.*—The partial exemption from taxation allowed by Sect. 3408 Rev. Stat. to deposits in a savings bank having no capital stock, and operating without profit to itself, applies to all deposits to the extent of \$2000 each, and not merely to deposits of \$2000 or less: *German Savings Bank v. Archbold*, S. C. U. S., Oct. Term 1881.

TRESPASS. See *Municipal Corporation*.

Tax Sale at wrong Hour—Liability of Officer.—A sale of property seized for taxes and sold by a collector at ten o'clock in the forenoon under an adjournment to one o'clock in the afternoon, is irregular, and renders him a trespasser; and the result is the same although the property sold well, was applied on the plaintiff's taxes, and his attorney was present, knew of his mistake and said nothing: *Buzzell v. Johnson*, 54 Vt.

TRIAL.

Statute—Existence of—Question of Law.—Whether a seeming act of the legislature is or is not a law is a judicial question to be determined by the court and not a question of fact to be tried by a jury: *Amoskeag Nat. Bank v. Ottawa*, S. C. U. S., Oct. Term 1881.

TRUST. See *Costs*.

UNITED STATES COURTS.

Construction of State Constitution—State Decisions followed—Statute.—An act of the legislature of a state which has been held by its highest court not to be a statute of the state because never passed as its constitution requires, cannot be held by the courts of the United States, upon the same evidence to be a law of the state: *Amoskeag Nat. Bank v. Ottawa*, S. C. U. S., Oct. Term 1881.

Practice—Proceedings under State Laws to enforce Discovery in aid of Execution—Parties in Federal Courts entitled to Benefit of.—A statutory proceeding under which, after a fruitless execution, a judgment-debtor is summoned before a judge or referee and compelled to make discovery as to his ownership of property, is within the provision of Sect. 916 U. S. Rev. Stat., that the party recovering a judgment in a common-law cause in any Circuit or District Court shall be entitled to similar remedies upon the same as are provided in like causes by the laws of the state in which such court is held: *Ex parte Boyd*, S. C. U. S., Oct. Term 1881.

USURY.

What is.—The defendants, having no money of their own to loan, solely at the request of the orator, and for his benefit, borrowed money, and loaned it to him under an agreement that they were to receive the same rate of interest from him that they were compelled to pay, and also, two per cent. for their expenses and credit, which agreement the master found was reasonable. The orator paid according to the contract, and the defendants paid the same to their lender. *Held*, 1, that the money so paid by the orator was not usury; as the defendants acted *bona fide*, and had no intention of contracting for usurious interest: and have not received to their own use, more than the legal rate. 2. But, that was usury, which was paid in excess of the legal rate, during that portion of the time when the defendants, by reasonable diligence, could have borrowed the money for six per cent: *Ricker v. Clark*, 54 Vt.

VENDOR AND VENDEE.

Vendor's Lien—How Lost.—The vendor of real estate, by taking collateral or other security for the purchase-money, waives his lien on the property sold: *Ilett v. Collins*, 103 Ill.

Where the debt for the purchase-money of real estate is barred by the Statute of Limitations, no vendor's lien can exist that they may be enforced: *Id.*

Vendor's Lien—Waiver by taking Security.—Where the vendor of land conveys the title and takes as security for the purchase-money the obligations of a third party, in the absence of any agreement to the contrary, he will be deemed to have waived his vendor's lien, and it does not matter that the securities so taken are worthless: *Boyer v. Austin*, 75 Mo.

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DISFRANCHISEMENT FROM PRIVATE CORPORATIONS.

DISFRANCHISEMENT, in the broad sense of the term, may be defined as the act of depriving a member of a corporation of his right, as such, by expulsion. The power of disfranchisement though vested in many corporations cannot be exercised by them in an arbitrary manner. Each corporator has a certain vested interest in the franchise which, in itself, constitutes property, and of which he cannot be deprived except for sufficient cause and in a proper manner: *State v. Georgia Medical Society*, 33 Ga. 608. If the corporation happen to own property, either real or personal, each member has also a vested interest in that, of which he cannot arbitrarily be stripped: *Evans v. The Philadelphia Club*, 50 Penn. St. 107. Hence "where any member of a corporation feels that he is aggrieved or injured by the illegal or oppressive action of the body it is his right to appeal to the courts for redress and protection; and it is the right and duty of the court to investigate such charges, when properly before it, and to judge of the legality of the action of the corporation in expelling a member or depriving him of any other legal right:" *State v. Georgia Medical Society*, 33 Ga. 608; *Bagg's Case*, 11 Rep. 99.

The power of the courts is, however, confined to the affording of a remedy in case of illegal disfranchisement. They have no

power of themselves to disfranchise the members of a corporation : *Attorney-General v. Earl of Clarendon*, 17 Ves. 491 ; *Neall v. Hill et al.*, 16 Cal. 145. Unless, indeed, such power be expressly conferred upon them by the charter, in which case it seems probable that their jurisdiction would be exclusive, and the usual powers of the corporate body in the premises ousted : *People ex rel. Gray v. Medical Society of the County of Erie*, 24 Barb. 570.

The aim of this article is to set out briefly the principles by which the courts have been guided in their adjudications upon the exercise of the right of disfranchisement by private corporations. The subject falls naturally into three heads : 1. For what cause may a member be disfranchised ; 2. In what manner must a member be disfranchised ; 3. In case of an illegal disfranchisement what remedy will the courts afford.

I. For what cause may a member be disfranchised.

The right of disfranchising its members may either be expressly conferred upon a corporation by the terms of its charter or implied from the simple fact of the corporate existence. An express authority to exercise this right may assume any one of several shapes. A corporation may be empowered to expel its members for any reasonable cause, in which case it seems that it is for the corporate body, solely, to say what is reasonable cause : *Inderwick et al. v. Snell*, 2 McN. & G. 216.

Again, a corporation may be empowered to expel its members for breaking the established rules and regulations to its injury. Where this is the case the corporation has clearly the power of establishing what lawful and reasonable rules and regulations it pleases, and of expelling its members for such an infringement of them as it deems prejudicial to its interests : *Black and White Smiths' Society v. Vandyke*, 2 Whart. 309. Again, a corporation may be empowered to expel any member in case he be detected in the commission of a certain class of offences. Where this is the case the corporation it seems has the exclusive power of determining whether any specific act comes within the class of offences which constitutes cause for expulsion : *Commonwealth ex rel. Bryan v. Pike Beneficial Society*, 8 W. & S. 247.

In none of the three cases above mentioned will the courts review the action of the corporation, unless of course there be actual *malâ fides* shown. See *Regina v. Governors of Darlington Free*

Grammar School, 14 L. J. (Q. B.) 67; *People ex rel. Stevenson v. Higgins*, 15 Ill. 110.

Charters, however, conferring such broad powers are not ordinarily granted, and where the courts are vested with the right of incorporating societies, charters containing a grant of such powers will not be approved: *Butchers' Beneficial Association*, 38 Penn. St. 298; *Beneficial Association of Brotherly Unity*, 38 Id. 299. Where the terms of a charter merely provide that the corporation shall have power to disfranchise its members or to disfranchise them when it sees fit, without distinctly specifying what shall constitute sufficient cause, this will not be construed to vest in it any further authority in this regard than it would have by implication independent of all charter provisions: *State ex rel. Graham v. Chamber of Commerce*, 20 Wis. 63.

Corporations whose purposes are primarily or exclusively those of gain have no power of disfranchisement, unless it is expressly conferred by the charter: *In re Long Island Railroad Co.*, 19 Wend. 37; *Evans v. Philadelphia Club*, 50 Penn. St. 107. All other private corporations, however, are vested incidentally with this power. The doubts expressed upon this point in *Fawcett v. Charles*, 13 Wend. 473, have been conclusively set at rest by the later authorities. The cases in which a corporator may be expelled by virtue of the implied power of disfranchisement vested in the corporate body arrange themselves under three principal heads.

1. Where he has committed some offence which bears no immediate relation to his corporate duty or character but is in itself of so infamous a nature as to render the offender unfit to exercise the franchise and associate with honest men.

2. Where he has committed some offence which relates merely to his corporate duty or character, and which amounts to a breach of the condition tacitly or expressly annexed to the franchise.

3. Where he has committed some offence of a mixed nature which is not only contrary to his duty as a corporator, but also infamous in its nature and indictable by the law of the land: *Rex v. Richardson*, 1 Burr. 539; *Fawcett v. Charles*, 13 Wend. 473; *People ex rel. Gray v. Medical Society of the County of Erie*, 24 Barb. 570; *People ex rel. Thacher v. N. Y. Commercial Association*, 18 Abb. Pr. 271; *Commonwealth v. St. Patrick's Ben. Soc.*, 2 Binn. 441; *Evans v. Philadelphia Club*, 50 Penn. St. 107; *People ex rel. Page v. Board of Trade*, 45 Ill. 112; *State ex rel.*

Graham v. Chamber of Commerce, 20 Wis. 63; *State ex rel. Danforth v. Kuehn*, 34 Wis. 229.

The corporation cannot proceed to disfranchise a member for the first of these causes until he has been indicted therefor by the civil authorities and convicted by a jury: Wilcock on Mun. Corp., sect. 646; *Leech v. Harris et al.*, 2 Brewst. 571.

The corporation may proceed to disfranchise a member for the second of these causes without such prior indictment and conviction: Wilcock on Mun. Corp., sect. 639. Whether a corporation may disfranchise for the third of these causes without a prior indictment and conviction seems doubtful. Mr. Wilcock inclines to believe that it cannot: Wilcock on Mun. Corp., sect. 640. But see *contra*, *People ex rel. Thacher v. N. Y. Commercial Association*, 18 Abb. Pr. 271.

The breach of a member's corporate duty is by far the most frequent cause for expulsion. Every person who becomes a member of a corporation impliedly undertakes to do or to say nothing which shall be injurious to the interests of the body. If he does, his corporate rights are justly forfeited, and he may properly be disfranchised. The implied right of disfranchisement for breach of corporate duty is in some corporations affected by the provisions of the by-laws. In many instances, it is true, these are simply declaratory in their nature, and specify as causes of disfranchisement offences which would of themselves, without any special provision, authorize the corporation to exercise its expelling powers. Sometimes, however, they prescribe new duties for the corporators, a breach of which would not of itself constitute valid ground for disfranchisement and then annex that penalty in case of such breach. The validity of such by-laws, and of course therefore of all disfranchisements effected under them, is to be determined by various considerations. The by-law must be in its nature reasonable: *People ex rel. Gray v. Medical Society of the County of Erie*, 24 Barb. 570; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Penn. St. 264; *Dawkins v. Antrobus*, L. R., 17 Ch. Div. 615, and must not be opposed to public policy: *People ex rel. Doyle v. N. Y. Benevolent Society*, 3 H n 361; *People ex rel. Gray v. Medical Society of the County of Erie*, 24 Barb. 570. The breach of the duties imposed by it must also appear to be in its nature clearly injurious to the interests of the corporation. A by-law authorizing expulsion for non-compliance with mere minor and

unimportant regulations is void: *Evans v. Philadelphia Club*, 50 Penn. St. 107.

A deviation from the duties prescribed by the by-laws before becoming a member of a corporation, will in no case constitute a valid ground for disfranchisement: *People ex rel. Bartlett v. Medical Society*, 32 N. Y. 187.

The following decisions as to what are and what are not sufficient causes for the exercise of the implied power of disfranchisement by corporations of various kinds will best illustrate this branch of the subject:

COMMERCIAL ASSOCIATIONS.—These are usually established to promote just and equitable principles in trade, to encourage a high standard of commercial honor and credit, and to facilitate the transaction of business. The following offences when particularly specified by the by-laws as causes of disfranchisement have been held to be properly visited with that penalty. Failure promptly to comply with the terms of a contract: *People ex rel. Page v. Board of Trade*, 45 Ill. 112; even though it be made with a person not a member of the association: *Dickenson v. Chamber of Commerce*, 29 Wis. 45; or though it be purely parol and therefore not enforceable at law by virtue of the provisions of the Statute of Frauds: *Id.* The obtaining of goods under false pretences, though from a non-member outside the jurisdiction of the corporation: *People ex rel. Thacher v. N. Y. Commercial Association*, 18 Abb. Pr. 271. The carrying on of business outside the rooms of the association either before or after ordinary business hours: *State ex rel. Cuppel v. Chamber of Commerce*, 47 Wis. 670. It seems also that where there is a special provision to that effect in the by-laws insolvency will form a valid cause for suspension from such associations: *Moxey's Appeal*, 9 Weekly Notes Cases 441.

The following offences have been held not to furnish sufficient ground for disfranchisement. The institution of legal proceedings to prevent the sale of a seat claimed by the relator to whose title an adverse decision had been rendered by the board of managers: *People ex rel. Elliott v. N. Y. Cotton Exchange*, 8 Hun 216. The refusal to submit to the arbitration of a board after having once brought suit in the civil courts, although the by-laws specially provided that if any member should fail to submit to such arbitra-

tion he might be disfranchised: *State ex rel. Graham v. Chamber of Commerce*, 20 Wis. 63. The refusal to pay an award rendered by a board of arbitrators, the by-laws vesting jurisdiction in that board only in case of wilful and fraudulent breach of conduct, and the right of appeal to the whole body which was secured by said by-laws having been denied on the question of jurisdiction merely without going into the full merits of the controversy: *Savannah Cotton Exchange v. State*, 54 Ga. 668. See also *White v. Brownell*, 2 Daly 329.

BOARDS OF FIRE UNDERWRITERS.—These corporations are established to preserve uniform rates of insurance. Apart from all provisions in the by-laws the charging of lower rates than those established by the association constitutes valid ground for disfranchisement: *People ex rel. Pinckney et al. v. N. Y. Board of Fire Underwriters*, 7 Hun 248.

MEDICAL SOCIETIES.—These associations are generally established for the purpose of regulating and improving the practice of physic and surgery and for promoting professional intercourse among their members. The following offences have of themselves been held valid causes for disfranchisement. The selling out of a practice and afterwards returning and resuming business in the same locality to the prejudice of the vendee: *Barrows v. Medical Society*, 12 Cush. 402. The constant vilifying of the society and holding oneself out as ready to practice either as an allopath or a homeopath at the option of the patient: *Ex parte Paine*, 1 Hill 665. The following offences have been held insufficient to warrant expulsion. The presentation to the society on entrance of a diploma insufficient to entitle to membership under the charter of the association: *Fawcett v. Charles*, 13 Wend. 473. The advertisement of a patent instrument, such action being prohibited by a code of professional ethics adopted by the society: *People ex rel. Bartlett v. Medical Society*, 32 N. Y. 187. The reception of a fee less than that prescribed by a tariff adopted by the association, although the by-laws specially provided that for this offence a member might be expelled: *People ex rel. Gray v. Medical Society*, 24 Barb. 270. Becoming surety upon the official bond of a colored person in the state of Georgia, after the War of the Rebellion, or giving bail in said state at said time for a colored person charged with riot: *State v. Georgia Medical Society*, 38 Ga. 608.

BENEFICIAL ASSOCIATIONS.—These are organized for mutual assistance in case of death or sickness. It has been held that it is sufficient cause for disfranchisement from these associations, if a member alters a physician's bill so as to entitle himself to greater aid from the society: *Commonwealth v. Philanthropic Society*, 5 Binn. 486. And where that penalty is specially affixed by the by-laws, if he voluntarily enlists as a soldier for active service: *Franklin Beneficial Association v. Commonwealth*, 10 Penn. St. 357; or feigns sickness in order to obtain aid: *Society for the Visitation of the Sick v. Commonwealth*, 52 Penn. St. 125; or fails to pay his dues: *Hussey v. Gallagher*, 61 Ga. 86; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Penn. St. 264; *contra*, *People ex rel. Pulford v. Fire Department*, 31 Mich. 458. The following offences have, on the contrary, been deemed insufficient cause for disfranchisement, although that penalty was specially annexed to them by the by-laws. The vilifying of a fellow member: *Commonwealth v. St. Patrick's Ben. Soc.*, 2 Binn. 440. Neglect to take the sacrament according to the specified form of a certain religious body, where the corporation is in its nature purely secular: *People ex rel. Schmitt v. St. Franciscus Beneficial Society*, 24 How. Pr. 216. The failure to pay dues after an illegal suspension: *People ex rel. Doyle v. N. Y. Benevolent Society*, 3 Hun 361. And in no event when a member has once been fined for the commission of an offence can he afterwards be expelled for the same cause: *Id.*

SOCIAL CLUBS.—In *Evans v. Philadelphia Club*, 50 Penn. St. 107, it was held that the striking of one member by another in the bar room of the club upon considerable provocation was not sufficient cause for disfranchisement, under a by-law providing for expulsion in case of disorderly conduct. This case was, however, decided by a divided court and carries no great weight. In the recent case of *Dawkins v. Antrobus*, L. R., 17 Ch. Div. 615, where the expulsion was from an unincorporated society, Sir GEORGE JESSEL, the Master of the Rolls, indicated it as his opinion that the publication of a libellous pamphlet on another member of the club and sending the same to him anonymously would not have been deemed adequate cause for disfranchisement had the club been incorporated. Lord Justice JAMES, however, thought otherwise. See *Hopkinson v. Marquis of Exeter*, L. R., 5 Eq. 63; *Labouchere v. Earl of Wharnccliffe*, L. R., 13 Ch. Div. 346.

EDUCATIONAL AND CHARITABLE INSTITUTIONS.—A member of the faculty of such institutions may be expelled for neglect of duty: *Murdock's Case*, 7 Pick. 303; but not for mere jealousy of other members of the faculty, or for a settled difference of opinion from them as to the proper methods of instruction: *Id.*

A trustee of such institutions may be expelled or charging the corporation with money never paid: *Commonwealth v. Guardians of the Poor*, 6 S. & R. 469. But not for mere misappropriations of the funds: *Id.*; or for disrespect to his associates, or for failure to serve on a single committee to which he had been appointed: *Fuller v. Plainfield Academic School*, 6 Conn. 532.

The inmates of such institutions may in pursuance of the provisions of the by-laws be properly expelled for gross disorder: *People ex rel. Newman v. Sailors' Snug Harbor*, 54 Barb. 532.

RELIGIOUS SOCIETIES.—The charters of these societies usually provide that the corporators thereof shall consist only of such persons as are members of a specified religious body: *German Reformed Church v. Seibert*, 3 Barr 282. But this is not always the case: *People ex rel. Dilcher v. St. Stephens' Church*, 53 N. Y. 103. Where the charter does so provide it is exclusively for the religious body of itself by means of its regularly organized ecclesiastical courts to determine who are its members and who are not, and these courts may therefore of course deprive any one of his corporate rights for purely ecclesiastical offences, such as non-conformity, contumacy or immorality. Their decisions upon these points will never be reviewed by the civil tribunals. In cases, however, where they undertake to exercise a like power when the offence in question is not purely ecclesiastical in its nature, a grave question arises as to whether they have not overstepped the limits of their authority. Could, for example, an ecclesiastical court disfranchise a member for the use of alcoholic drinks or tobacco? Common sense would clearly seem to dictate that they could not, but authority is lacking upon this subject. See note to *Gartin v. Penick*, 9 Am. Law Reg. (N. S.) 210.

Where the charter makes no such provision as that above described it seems that a religious corporation has no power to disfranchise a member for mere moral delinquency: *People ex rel. Dilcher v. St. Stephens' Church*, 53 N. Y. 103.

In Illinois and Maryland somewhat different principles obtain with reference to the right of disfranchisement from private cor-

porations from those above laid down. All associations for moral, social or beneficial purposes are deemed, though incorporated, to stand as regards their powers of expulsion upon the same footing as unincorporated societies. They are left therefore to enforce their own rules and regulations as they see fit, and may disfranchise for whatever cause they may deem proper: *People ex rel. Rice v. Board of Trade*, 80 Ill. 194, overruling *People ex rel. Page v. Board of Trade*, 45 Ill. 112; *Anacosta Tribe of Red Men v. Murbach*, 13 Md. 91. The law upon this point in Illinois is by no means, however, to be considered as settled: *Baxter v. Board of Trade*, 83 Ill. 147; *Sturges v. Board of Trade*, 86 Ill. 441.

See as to the rights of unincorporated societies in this respect: *Innes v. Wylie et al.*, 1 Carr. & K. 257; *Blisset v. Daniel*, 10 Hare 493; *Hopkinson v. Marquis of Exeter*, L. R., 5 Eq. 63; *Fisher v. Keane*, L. R., 11 Ch. Div. 353; *Labouchere v. Earl of Wharncliffe*, L. R., 13 Ch. Div. 346; *Dawkins v. Antrobus*, L. R., 17 Ch. Div. 615; *White v. Brownell*, 2 Daly 329; *People ex rel. Dilcher v. St. Stephens' Church*, 53 N. Y. 103; *Moxey's Appeal*, 9 Weekly Notes (Phila.) 441; *Smith v. Neilson*, 18 Vt. 511.

In England it seems to be held that a defect of original qualification for membership in a corporation constitutes good ground for disfranchisement: *Regina v. Saddlers' Co.*, 10 H. L. Cas. 404; *Fawcett v. Charles*, 13 Wend 478. In America the contrary has been held to be the law.

II. In what manner must a member be disfranchised.

In order legally to disfranchise a member of a corporation the proceedings must be taken in a certain specified manner. If the charter provides what that manner shall be, its requirements must be strictly complied with, otherwise the attempted disfranchisement will be void: *Commonwealth v. Pike Beneficial Society*, 8 W. & S. 247. If there be no express charter provision the method of disfranchisement may be regulated by the by-laws: *State v. Trustees of Vincennes University*, 5 Ind. 77; *Commonwealth v. German Society*, 15 Penn. St. 251. And these by-laws may be so framed as to limit the implied power of expulsion vested in the corporation: *People ex rel. Godwin v. American Institute*, 44 How. Pr. 468. Where the terms of the by-laws prescribe the method of expulsion, that method must be strictly followed by the society: *Fisher v. Keane*, L. R., 11 Ch. Div. 353; *Labouchere v. Earl of Warncliffe*, 13 Id. 346; *Commonwealth v. Guardians*

of the Poor, 6 S. & R. 469; *Washington Beneficial Society v. Bacher*, 20 Penn. St. 425; *Society for the Visitation of the Sick v. Commonwealth*, 52 Id. 125; *Savannah Cotton Exchange v. State*, 54 Ga. 668; *Weber et al. v. Zimmerman*, 22 Md. 156; *People ex rel. Godwin v. American Institute*, 44 How. Pr. 468; *Southern Plank Road Co. v. Hixon*, 5 Ind. 165. Unless there be an express provision in the charter no member of a corporation can be disfranchised without notice to him, and unless a fair opportunity be given him to defend himself against the charges that have been preferred: *Wilcock on Mun. Corp.*, sects. 691, 700; *Bagg's Case*, 11 Rep. 99; *Innes v. Wylie et al.*, 1 Carr. & C. 257; *Blisset v. Daniel*, 10 Hare 498; *Fisher v. Keane*, L. R., 11 Ch. Div. 353; *People ex rel. Dilcher v. St. Stephens' Church*, 53 N. Y. 103; *People ex rel. Doyle v. N. Y. Benevolent Society*, 3 Hun 361; *Wachtel v. Noah Widows' and Orphans' Beneficial Society*, 84 N. Y. 28; *People ex rel. Schmitt v. St. Francisus Benevolent Society*, 24 How. Pr. 216; *Commonwealth v. Penna. Ben. Soc.*, 2 S. & R. 141; *Commonwealth v. German Society*, 15 Penn. St. 251; *Diligent Fire Engine Co. v. Commonwealth*, 75 Id. 291; *Dubree v. Reliance Fire Engine Co.*, 1 Weekly Notes (Phila.) 524; *Riddell v. Harmony Fire Engine Co.*, 8 Phila. 311; *Murdock's Case*, 7 Pick. 303; *Murdock v. Phillips Academy*, 12 Pick. 244; *Sleeper v. Franklin Lyceum*, 7 R. I. 523; *Sibley v. Carteret Club of Elizabeth*, 40 N. J. Law 295; *Southern Plank Road Co. v. Hixon*, 5 Ind. 165; *State v. Adams*, 44 Mo. 570; *People v. Fire Department*, 31 Mich. 458; *State v. Chamber of Commerce*, 47 Wis. 670. And so far has this doctrine as to notice been carried that it has been held irregular for a committee of the corporation who have been appointed to inquire into an alleged offence to proceed without notifying a delinquent, and an expulsion founded upon the report of such committee after due notice to the offending member has been pronounced void: *Labouchere v. Earl of Wharncliffe*, L. R., 13 Ch. Div. 346. The conferring of express power by the charter upon a corporation to disfranchise its members does not do away with the necessity of notice: *Delacey v. Neuse River Navigation Co.*, 1 Hawks (N. C.) 274. And a by-law authorizing expulsion without notice is simply void: *People v. Fire Department*, 31 Mich. 458.

The mere posting of the name of the offending member in the corporate premises is not sufficient notice: *Sibley v. Carteret Club of Elizabeth*, 40 N. J. Law 295. The notice must, in the absence of

any provision in the charter or by-laws, be a personal one: *Wachtel v. Noah Widows' and Orphans' Ben. Soc.*, 84 N. Y. 28.

Provision may, however, be made by the by-laws for other methods of transmitting the notice, as, for example, through the mail. A mere change of residence does not excuse the failure to serve a notice, even though there be a provision in the by-laws requiring each member to notify the society whenever he makes such change, under penalty of a fine: *Id.* Nor will a long and continuous violation of the rules of the society excuse the service of the notice: *Harmstead v. Washington Fire Co. et al.*, 8 Phila. 331.

The notice may properly be served on Sunday if the meetings of the corporation are usually held on that day: *People ex rel. Corrigan v. Young Mens' Father Matthew Ben. Soc.*, 65 Barb. 357: but must be served a reasonable time before the meeting convened to pass upon the question of the expulsion of the member, and must specify the time and place of such meeting: Wilcock on Mun. Corp. 692: *Murdock v. Phillips Academy*, 12 Pick. 244.

The notice must contain a reasonably specific statement of the charges preferred against the member, though they need not be set out with the nicety and precision of an indictment: Wilcock on Mun. Corp. 694; *Murdock's Case*, 7 Pick. 303; *Murdock v. Phillips Academy*, 12 Id. 244; *Fuller v. Plainfield Academic School*, 6 Conn. 532.

If a member appears without notice and defends or admits the charges made against him, the necessity for notice is, of course, dispensed with: Wilcock on Mun. Corp. 695; *Moxey's Appeal*, 9 Weekly Notes (Phila.) 441; *Commonwealth v. Penna. Ben. Society*, 2 S. & R. 141. In order to enable a member to prepare his defence, access to all the books and papers of the corporation should be afforded him, and a refusal to allow him to inspect these will invalidate his subsequent expulsion: *Murdock v. Phillips Academy*, 12 Pick. 244.

The power of disfranchisement is said to be reposed at common law in the whole corporate body: Grant on Corp. 240; Wilcock on Mun. Corp. 629; *Weber v. Zimmerman*, 22 Md. 156. It is, therefore, held by some authorities that this power cannot be reposed in a select body: *State ex rel. Graham v. Chamber of Commerce*, 20 Wis. 63; unless there be a provision to that effect in the charter: *State v. Chamber of Commerce*, 47 Wis. 670.

It has been held, however, in many instances that it is compe-

tent for a corporation by its by-laws to delegate this power to a select number of its members: Wilcock on Mun. Corp. 634: *Hussey et al. v. Gallagher*, 61 Ga. 86. See *Green v. African M. E. Society*, 1 S. & R. 254. And in other cases the validity of expulsions by such select bodies acting in pursuance of the by-laws has been assumed without controversy: *People ex rel. Thacher v. N. Y. Commercial Association*, 18 Abb. Pr. 271; *White v. Brownell*, 2 Daly 329; *People ex rel. Page v. Board of Trade*, 45 Ill. 112. But a by-law cannot vest the power of disfranchisement in a single officer who is made to act at once as witness and as judge: *People ex rel. Pulford v. Fire Department*, 31 Mich. 458; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Penn. St. 2. 4.

The body in whom the power of disfranchisement is vested must also not be prejudiced against the offending member. It cannot consist, therefore, of the very men against whom the offence in question has been committed: *Smith v. Nelson*, 18 Vt. 511; and where a select body has illegally proceeded to expel a member without notice or trial it cannot afterwards retrace its steps and expel him in due form: *Murdock v. Phillips Academy*, 12 Pick. 244. Where the power of expulsion is reposed in the whole corporate body, each member should be notified of the time and place of the meeting at which the trial is to be held, and also of the business about to be transacted: *Weber v. Zimmerman*, 22 Md. 156. The meeting may be held on Sunday if the corporation has been accustomed to meet on that day: *People ex rel. Corrigan v. Young Mens' Father Matthew Ben. Soc.*, 65 Barb. 357. The trial must be a fair and open one: *State v. Adams*, 44 Mo. 570; *Murdock's Case*, 7 Pick. 303. The accused member must be allowed a full hearing, the privilege of counsel and an opportunity to object to the relevancy or competency of any evidence offered against him: *Murdock v. Phillips Academy*, 12 Pick. 244. If he remains silent or fails to appear, the charge must, nevertheless, be satisfactorily proved: Wilcock on Mun. Corp. 702; *People ex rel. Corrigan v. Young Mens' Father Matthew Ben. Soc.*, 65 Barb. 357. Finally, a solemn sentence must be pronounced upon the answers and proofs adduced: *Murdock v. Phillips Academy*, 12 Pick. 244.

Any deviation from the foregoing course of proceeding is fatal, and the defect will not be remedied by an affirmance of the sen-

tence by an appellate tribunal constituted by the corporation; which has acted with perfect regularity: *Id.*

Where a member has once been regularly tried by a corporation and acquitted, it seems that he cannot afterwards be again tried and expelled for the same offence: *Commonwealth v. Guardians of the Poor*, 6 S. & R. 469. But where a member has been irregularly tried and expelled there is nothing to prevent the corporation from reinstating him in his rights and afterwards proceeding to try and expel him in due process of law: *State ex rel. Cuppel v. Chamber of Commerce*, 47 Wis. 670. An actual formal vote of the body vested with the right of disfranchisement is necessary in order to deprive a member of his corporate rights: *Sibley v. Carteret Club of Elizabeth*, 40 N. J. L. 295; *State ex rel. Linley v. Bryce*, 7 Ohio 414; *Harnstead v. Washington Fire Co. et al.*, 8 Phila. 331. Even where the charter expressly vests in the president and directors power to erase a member's name in case he commits certain specified offences it seems that definite action by the body corporate is necessary to disfranchise: *Delacey v. Neuse River Navigation Co.*, 1 Hawks (N. C.) 274. See also *Doremus v. Dutch Reformed Church*, 2 Green Ch. (N. J.) 332.

The right of membership in a corporation is never lost by mere non-user: *State v. Trustees of Vincennes University*, 5 Ind. 77. Unless indeed there be a specific provision to that effect in the charter: *Crocker v. Old South Society*, 106 Mass. 489.

III. In case of an illegal disfranchisement what remedy will the courts afford.

Wherever, as has been said, a member of a corporation has been illegally disfranchised he may apply to the courts for redress and protection. The courts will, in every case, consider the regularity of the method in which the disfranchisement has been effected, and if there be any departure from the course of proceedings above indicated will afford instant relief. They will also in every case inquire as to the offence which has constituted the cause for disfranchisement. The fact that the offence has been committed is conclusively settled by the finding of the corporation: see *State ex rel. Cuppel v. Chamber of Commerce*, 47 Wis. 670. But whether the commission of the offence does or does not constitute sufficient ground for disfranchisement is for the court.

In those cases where the offence does not consist of the violation of a by-law but merely of some alleged breach of a corporator's

implied duty, the court will simply consider whether it is or is not injurious to the interests of the corporation, and the affording or withholding of relief will be regulated accordingly: *Fawcett v. Charles*, 13 Wend. 473; *People ex rel. Dilcher v. St. Stephens' Church*, 53 N. Y. 103; *People ex rel. Elliott v. N. Y. Cotton Exchange*, 8 Hun 216; *Commonwealth v. Philanthropic Society*, 5 Binn. 486; *Ex parte Paine*, 1 Hill 665; *Commonwealth v. Guardians of the Poor*, 6 S. & R. 469; *Murdock's Case*, 7 Pick. 303; *Barrows v. Medical Society*, 12 Cush. 402; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *Savannah Cotton Exchange v. State*, 54 Ga. 668. In those cases where the offence does consist of the violation of a by-law the court will consider (1) whether the duties imposed by that by-law are reasonable and proper, and (2) whether the violation of them is so far injurious to the interests of the corporation as to warrant the imposition of the penalty of expulsion: *People v. N. Y. Benevolent Society*, 3 Hun 361; *People v. N. Y. Board of Underwriters*, 7 Id. 248; *People v. Medical Society*, 32 N. Y. 187; *People v. Medical Society*, 24 Barb. 570; *People v. Sailors' Snug Harbor*, 54 Id. 532; *People v. St. Francis Benevolent Society*, 24 How. Pr. 216; *Commonwealth v. St. Patrick's Ben. Soc.*, 2 Binn. 440; *Franklin Ben. Association v. Commonwealth*, 10 Penn. St. 357; *Evans v. Philadelphia Club*, 50 Id. 107; *Society for the Visitation of the Sick v. Commonwealth*, 52 Id. 125; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Id. 264; *People v. Board of Trade*, 45 Ill. 112; *Pulford v. Fire Department*, 31 Mich. 458; *Dickenson v. Chamber of Commerce*, 29 Wis. 45; *State v. Chamber of Commerce*, 20 Id. 63; *State v. Chamber of Commerce*, 47 Id. 670; *State v. Georgia Medical Society*, 38 Ga. 608; *Hussey et al. v. Gallagher*, 61 Id. 86.

The courts will also construe the true meaning of the by-laws: *Franklin Beneficial Society v. Commonwealth*, 10 Penn. St. 357; *People v. N. Y. Commercial Association*, 18 Abb. Pr. 271; *State v. Chamber of Commerce*, 20 Wis. 63; *Dickenson v. Chamber of Commerce*, 29 Id. 45; and will decide whether the specific offence assigned as cause for disfranchisement comes within the meaning of their provisions: *People v. Sailors' Snug Harbor*, 54 Barb. 532; *State v. Georgia Medical Soc.*, 38 Ga. 608. Of course if the duties imposed by the by-laws be not reasonable and proper, or if the breach of them be not injurious to the interests of the cor-

poration or if the offence in question under a just interpretation of the by-laws does not amount to such a breach, the disfranchisement cannot be maintained. And even if the by-law in general be valid and the specified offence within its terms, yet if that particular offence be of such a character as cannot be deemed injurious to the interests of the corporation, the expulsion will not be sustained: *Evans v. Philadelphia Club*, 50 Penn. St. 107; *People v. Mechanics' Aid Soc.*, 22 Mich. 86. Where a person has been illegally disfranchised from a corporation, the proper remedy is a writ of mandamus to restore him to his rights: Wilcock on Mun. Corp. 96; *Bagg's Case*, 11 Rep. 99; *People v. Medical Soc.*, 24 Barb. 570; *Evans v. Philadelphia Club*, 50 Penn. St. 107; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Id. 264; *Sibley v. Carteret Club of Elizabeth*, 40 N. J. L. 295; *Union Church of Africans v. Sanders*, 1 Houst. 100; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *People v. Board of Trade*, 45 Ill. 112; *People v. Mechanics' Aid Soc.*, 22 Mich. 86; *Delacey v. Neuse River Navigation Co.*, 1 Hawks (N. C.) 274; *State v. Georgia Medical Soc.* 33 Ga. 608; *Hussey et al. v. Gallagher*, 61 Id. 86; *State v. Lusitanian Portuguese Soc.*, 15 La. Ann. 73. But in Kentucky, under the statutes there in force, a writ of mandamus cannot be granted to restore a member of a private corporation: *Cook v. College of Physicians*, 9 Bush 542.

The courts are always unwilling to interfere in the matters of private corporations: *Hussey et al. v. Gallagher*, 61 Ga. 86; and hence will refuse to grant a writ of mandamus where the desired object may be obtained without serious difficulty and without the aid of the court: *Harrison et al. v. Simonds et al.*, 44 Conn. 318.

Any person invoking the aid of the court must, therefore, in order to obtain the writ, show that he has an undoubted grievance, and that he has no other adequate remedy. He must, therefore, prove that he has been duly elected a member of the corporation, and if that body have exceeded their chartered powers in electing him he has no standing in court: *Diligent Fire Engine Co. v. Commonwealth*, 75 Penn. St. 291. He must also show beyond peradventure that he has been disfranchised: *People v. St. Stephens' Church*, 53 N. Y. 103. And the mere fact that he has been prevented from voting or speaking at several successive corporate meetings will not in itself be deemed conclusive evidence of his disfranchisement: *Crocker v. Old South Society*, 106 Mass. 489.

If an opportunity is afforded to him to appeal to another tribunal constituted by the corporation, he must do so before he has recourse to the courts: *White v. Brownell*, 2 Daly 329; *German Reformed Church v. Seibert*, 3 Penn. St. 282.

Where a person illegally disfranchised from a corporation has brought suit and recovered damages for the injury done him, he will be deemed to have waived his right to a mandamus: *State v. Lipa*, 28 Ohio St. 668.

The practice is for the court to issue in the first place a writ of alternative mandamus: *Sleeper v. Franklin Lyceum*, 7 R. I. 523. The return to this writ must be certain and specific, containing a perfect justification of the expulsion, and setting out at length the cause thereof and the mode in which it has been effected: *Bagg's Case*, 11 Rep. 99; *People v. St. Franciscus Ben. Soc.*, 24 How. Pr. 216; *Green v. African M. E. Soc.*, 1 S. & R. 254; *Society for the Visitation of the Sick v. Commonwealth*, 52 Penn. St. 125; *People v. Mechanics' Aid Soc.*, 22 Mich. 86. If the return be defective an opportunity of amending it will not be afforded: *People v. American Institute*, 2 N. Y. Leg. Obs. 170.

On the filing of the return the relator may either rely upon its insufficiency or traverse it by proof. But after having adopted one of these courses and failed, he cannot afterwards resort to the other: *State v. Lusitanian P. Soc.*, 15 La. Ann. 73. Where the final decision is in favor of the relator, a writ of peremptory mandamus is issued to restore him to all his corporate rights.

Attempts have from time to time been made to invoke the aid of courts of equity to restrain by injunction corporate bodies from illegally disfranchising their members. Such attempts have, however, invariably failed, the courts being of opinion that they have no jurisdiction in the premises: *Gregg v. Massachusetts Medical Soc.*, 111 Mass. 185; *Sturges v. Board of Trade*, 86 Ill. 441. Attempts have also been made to induce these courts to restore illegally disfranchised members by mandatory injunction. These also have failed: *Fisher v. Board of Trade*, 80 Ill. 85. The mere circumstance that the complainant may be deprived of intermediate profits earned by the corporation will not entitle him to this relief, at least where a proceeding by mandamus has been instituted to test his right and is still pending undetermined: *Baxter v. Board of Trade*, 83 Ill. 147.

LAWRENCE LEWIS, Jr.

RECENT ENGLISH DECISIONS.

Crown Cases Reserved.

REGINA v. LOVELL.

It is larceny for a person to demand and receive by intimidation and threats an excessive overcharge for work done for the party paying, as, 5s. 6d. for a fair charge of 1s. 3d.

Regina v. McGrath, L. R., 1 C. C. R. 205, affirmed.

THE prisoner was tried before the chairman of the Worcestershire Quarter Sessions on an indictment which charged him, in the first count, with stealing the sum of 5s. 6d., the property of Eliza Grigg, and, in the second count, with demanding with menaces from the said Eliza Grigg the sum of 5s. 6d., with intent to steal the same. The facts were these :

The prisoner was a travelling grinder. He ground two pairs of scissors for the prosecutrix, for which he charged her 4d. She then handed him six knives to grind. He ground them and demanded 5s. 6d., for the work. She refused to pay the amount on the ground that the charge was excessive. The prisoner then assumed a menacing attitude, kneeling on one knee, and threatened the prosecutrix, saying, "You had better pay me, or it will be worse for you," and "I will make you pay."

The prosecutrix was frightened, and in consequence of her fears, gave the prisoner the sum demanded. Evidence was given that the trade charge for grinding the six knives would be 1s. 3d. It was contended for the prisoner that as some money was due, the question rested simply on a *quantum meruit*, and that there was no larceny or menacing demand with intent to steal. The chairman overruled the objection, and directed the jury on the authority of *Reg. v. McGrath*, L. R., 1 C. C. R. 205, that if the money was obtained by frightening the owner, the prisoner was guilty of larceny. They found that the money was obtained from the prosecutrix by menaces, and that the prisoner was guilty.

The question for this court was, whether upon the facts stated, he was properly convicted.

No counsel appeared.

The court, Lord COLERIDGE, C. J., LINDLEY, HAWKINS, LOPES
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and BOWEN, JJ., held that the case was governed by *Reg. v. MacGrath*, and upheld the conviction.

Although larceny generally involves an unlawful *taking*—a trespass—against, or at least without the consent of the owner, yet it is familiar law that fraud and intimidation often supplies the place of force, and assent obtained under such circumstances has no legal effect.

Therefore, it is well settled that if a person, with an existing intent to steal, burrows or hires property, and after having thus obtained possession by consent of the owner, sells the same, or otherwise converts it to his own use, *animo furandi*, he is as much guilty of larceny as if he had acquired possession of the same by force or violence: *State v. Humphrey*, 32 Vt. 569; *Commonwealth v. Barry*, 124 Mass. 325; *Armstrong's Case*, 1 Lew. C. C. 273; *Spence's Case*, Id. 197; *Star-ke v. The Commonwealth*, 7 Leigh 752; *State v. Watson*, 41 N. H. 533; *Smith v. The People*, 53 N. Y. 111, and many other cases.

In such cases, however, it seems essential that the fraudulent intent should have existed at the time of acquiring the possession. It is a substitute for unlawful taking, and, therefore, if the property was acquired without wrongful intent, and afterwards, for the first time, the intent to steal arises, an unlawful conversion would not then amount to larceny, whatever other crime it might be: *Regina v. Cole*, 2 Cox C. C. 340; *Charlewood Case*, 2 East P. C. 689; *Semple's Case*, Id. 691.

For similar reasons intimidation, threats, &c., have been held equivalent

to fraud or stratagem in obtaining possession, as held in the principal case, and many others. Thus in *Reg. v. MacGrath*, 11 Cox C. C. 347, a woman standing in a mock auction room was falsely charged by the auctioneer with having bid 26s. for an article being sold, and being threatened with arrest if she did not pay the 26s. did so, through fear, and actually carried away the article itself. But the auctioneer was held guilty of larceny of the 26s. And see *Taplin's Case*, 2 East P. C. 712; *Zink v. The People*, 6 Abb. N. C. 413.

But it must be confessed this is carrying the doctrine much farther than the cases upon fraud do; for in the principal case and *MacGrath's Case*, not only did the prosecutor part with his possession, but also with the property itself. He intended, through fear no doubt, but still intended to part with his property in the thing transferred, whereas in the case of fraud, &c., it is universally agreed that if a person is induced by fraud to part with his property, or title in the thing delivered, and not merely with his temporary possession, the person acquiring it is not, by reason of the fraud, guilty of larceny, but only of obtaining goods or money under false pretences, or, perhaps, also of cheating at common law: *Ross v. The People*, 5 Hill 294; *Smith v. The People*, 53 N. Y. 111; *Lower v. The Commonwealth*, 15 S. & R. 93; *Commonwealth v. Barry*, 124 Mass. 325, and many other cases.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of Iowa.

WALLER v. DAVIS ET AL.

After the dissolution of a firm, one partner has no power to bind the others by executing a note in the firm name, even for a firm debt.

The assignment of his interest in the assets by one member of a firm to the other members does not, *ipso facto*, work a dissolution of the firm, but is only evidence of a dissolution.

In an action, however, upon a promissory note executed in the name of the firm by one member, after such assignment, evidence of such assignment is admissible as tending to show a dissolution of the firm, provided the payee in the note had knowledge of such assignment.

Where the articles of copartnership contemplate a continuance of the business after the withdrawal of a member, by the partners who do not withdraw, such continued partnership cannot be considered as identical with the partnership theretofore existing; and whether, if the remaining partners continue in business as a new partnership under the old name, a member thereof can bind the new firm by a promissory note given for an old debt, will depend upon the circumstances of the case; *e. g.*, whether the remaining partners, in their settlement with the outgoing partner, assume the liabilities of the firm, in which case it seems that any member of the new firm can bind such firm by giving a promissory note for a debt of the old firm. But in the absence of such an assumption of primary liability by the new firm, it seems that the authority to give the firm note for a debt of the old firm does not exist.

APPEAL from Dubuque Circuit Court.

The facts are sufficiently stated in the opinion of the court.

S. P. Adams, for appellant.

Hurd & Daniels, for appellee.

The opinion of the court was delivered by

ADAMS, J.—The undisputed facts are that the defendants and Atherton entered into a copartnership, under the name of Atherton, Davis & Co. by written articles, on the 17th of May 1871. While the copartnership continued they became indebted to the plaintiff for the amount for which the note was given. The note was executed on the 1st of March 1872, by Atherton, by affixing thereto the firm name. Before that time, however, Hulbert had ceased to take an active part in the business of the firm, and he claims that he had withdrawn from the firm and had ceased to be a member of the firm, and was not a member of any firm doing business under that name. He also claims that Kingman had withdrawn

from the firm and had ceased to be a member, and that by reason thereof, if for no other reason, the firm had become dissolved, as the plaintiff at the time of the execution of the note well knew.

1. The first question arises upon the exclusion of evidence offered by Hulbert. The evidence offered and excluded was that Kingman, in January 1872, sold and conveyed his interest in the firm property to his copartners Atherton and Davis. Hulbert insists that such sale and conveyance, if made, worked a dissolution of the partnership, from which it follows that the note, executed subsequently by Atherton in the firm name, was not the note of the firm.

We ought, perhaps, to say in passing that it is not claimed by the appellee, and it could not be properly claimed, that where a partnership is dissolved one of the members can ordinarily bind the others by executing a note in the firm name, though given for a firm debt. The question presented is as to whether the sale and conveyance by Kingman, if made, was a material circumstance, and if so whether, under the pleadings, it was competent for Hulbert to show it

In 1 Pars. on Cont. 197, the author says: "Any assignment of a copartner's interest in the partnership funds operates *ipso facto* a dissolution. This would certainly be true of the assignment of the whole of a copartner's interest, and perhaps of the assignment of any portion of his interest which required a closing of the partnership business and accounts to determine the value of the portion assigned." He cites *Horton's Appeal*, 13 Penn. St. 67; *Parkhurst v. Kinsman*, 1 Blatchf. 488; *Marquand v. N. Y. Manuf. Co.*, 17 Johns. 525; *Whitton v. Smith*, 1 Freem. Ch. (Miss.) 231. But it is difficult to say that an assignment of a copartner's interest would in any case necessarily require a closing of the partnership business, and it appears to us that it could not be held to operate *ipso facto* a dissolution. The learned author from whose text we have quoted seems himself to have reached the conclusion that it does not. In a note in the sixth edition of his work he says that the true principle seems to be stated in *Taft v. Buffum*, 14 Pick. 322. In that case it was held that an assignment of a copartner's interest does not operate *ipso facto* a dissolution, and is only evidence tending to show a dissolution.

If an assignment were made under such circumstances as to require a disposition of the partnership assets and payment of the

partnership debts, in order to determine the value of the interest assigned, it would, we think, ordinarily, in the absence of any other evidence, be difficult to resist the conviction that the understanding was, at least on the part of the assignor, that his connection with the firm was terminated. Such assignment would, ordinarily, interrupt the partnership business. But we can easily suppose a case where no interruption would necessarily be caused. Suppose a member of a law firm which owed no debts, and whose assets consisted solely of property of some kind which it had taken for fees, should assign his interest in the assets. Such an assignment, it would seem, would not of itself cause any interruption, and if the business should be continued as before it would not be necessary to suppose a dissolution of the firm and the old formation of a new one composed of the same persons, and even in a case where the partnership assets and liabilities are extensive and complicated, and involved in more or less uncertainty, so that an assignment by a co. partner of his interest in the assets would require the closing up and settlement of the prior partnership business, it would be competent to show, if such was the fact, that it was not the intention of the copartners to dissolve the partnership, nor would it be necessary to suppose, if they should continue in business without such intention, that the partnership was dissolved and a new one formed.

In the case at bar the alleged assignment was made by a partner to two of his copartners, and there was evidence tending to show that the assignor continued to interest himself in the business to some extent, and did not execute any paper showing a formal dissolution until some weeks afterwards. We do not think, therefore, that the assignment necessarily showed a dissolution. But it was not necessary that it should, to entitle Hulbert to introduce the evidence. If the assignment was only evidence tending to show a dissolution, it was not immaterial.

We proceed next to consider whether the pleadings were such as to justify its exclusion, and we have to say that we think they were not. We have already shown that the allegation of the petition was that the defendants and one Atherton were copartners, and as such executed to the plaintiff the note in suit. This the defendant Hulbert denied. It seems to us that the evidence was admissible under the issue thus made. The plaintiff proved the existence of the firm prior to the execution of the note. The presumption of its continuance was sufficient to make a *prima facie*

case for the plaintiff, so far as this point is concerned. But the presumption of the continuance of the firm was liable to be rebutted by evidence on the part of Hulbert of its dissolution. This he was entitled to prove by showing any fact or circumstance which had that tendency. It was not necessary for him to plead his evidence to entitle him to introduce it. But it is said that the fact of dissolution by the retirement of Kingman, if such was the fact, could not affect the plaintiff, who had done business with the firm and was an existing creditor, unless he had knowledge of the dissolution; and it is said that Hulbert, when offering the evidence of Kingman's assignment, did not offer to prove also that the plaintiff had knowledge of it.

The evidence was not objected to upon that ground, and it does not appear to have been excluded upon that ground. Besides, it appears that Hulbert at another time did offer to prove by the plaintiff himself that he had knowledge of the assignment. Now, while, as we have held, the sale if made did not necessarily show dissolution, and, as a consequence, knowledge of the sale would not strictly be knowledge of a dissolution, yet any fact tending to show dissolution must be regarded as admissible, if the plaintiff had knowledge of the fact.

2. It is insisted, however, that the sale at most would only show that Kingman retired, and while ordinarily the retirement of a partner works a dissolution, it could not have that effect in this case, because the articles of copartnership contemplated the possible retirement of one or more partners without a dissolution. It was provided in the articles that a partner might withdraw at the end of six months, and that the remaining partners should pay him for his interest. It is not to be denied, we think, that the articles contemplated a continuance of the business, and that, too, by a partnership composed of the persons who should not withdraw. But it appears to us that such partnership could not properly be considered as identical with the partnership theretofore existing. If there was a partnership after Kingman's withdrawal it was not constituted as was the partnership theretofore existing.

Whether if the remaining partners continued in business as a new partnership under the old name, a member thereof could bind the firm by a promissory note given for an old debt, would probably depend on circumstances. If Kingman had withdrawn under the articles—that is, if he had withdrawn at the end of six months,

and transferred to the remaining partners his interest, and they had settled with him upon the basis of its value, estimated by deducting from the estimated value of the assets the liabilities of the firm—there would be much ground for contending that, as between Kingman and the remaining partners, the latter assumed the liabilities and became primarily liable, and that, if a new firm was formed by such partners, either one of them could bind the firm by giving a promissory note for the liabilities, or any one of them. But in the absence of such assumption of primary liability it seems to have been held that the authority to give a firm note does not exist. *Spaunhoist v. Link*, 46 Mo. 197. The evidence offered for the purpose of showing Kingman's withdrawal was not such as to show an assumption of primary liability by the remaining partners. The evidence, therefore, was not properly excluded upon the ground that, if admitted, the result could not properly be different.

Some other questions are presented, but, under the view which we have expressed, it does not seem probable that they will arise upon another trial. In excluding the evidence in question we think that the court erred, and the judgment must be reversed.

The rule is generally laid down by the authorities that the assignment by one partner of all his interest in the joint property to a stranger, *ipso facto*, operates as a dissolution of the partnership: see Story on Part., § 307; 1 Pars. on Cont. 197; Pars. on Part. 400; *Jefferys v. Smith*, 3 Russ. 158; *Marquand v. N. Y. Manuf. Co.*, 17 Johns. 525; *Horton's Appeal*, 13 Penn. St. 67; *Conwell v. Sandidge*, 5 Dana 210; *Parkhurst v. Kinsman*, 1 Blatchf. C. C. 488; *Heath v. Sansom*, 4 B. & Ad. 172; *Monroe v. Hamilton*, 60 Ala. 226; *Saloy v. Albrecht*, 17 La. Ann. 75; *Carroll v. Evans*, 27 Tex. 262; *Miller v. Brigham*, 50 Cal. 615. The cases of *Marquand v. N. Y. Manuf. Co.*, *Carroll v. Evans*, and *Horton's Appeal*, cited above, are especially worthy of notice upon this question. The learned author of Lindley on Partnership with reference to this question says, "It is generally stated that if a member of an ordinary partnership

transfers his share, he thereby dissolves the partnership; but this proposition requires qualification. The true doctrine, it is submitted, is that if the partnership is at will, the assignment dissolves it; and if the partnership is not at will, the other members are entitled to treat the assignment as a cause of dissolution:" 1 Lind. on Part. § 698. The assignment to have this effect must, however, be something more than a mere security, for it seems settled that a mere mortgage or other lien upon the interest of a partner, does not, before foreclosure, effect a dissolution: *State v. Quick*, 10 Iowa 451; *Buford v. Nesly*, 2 Dev. Eq. 481. Without, however, going into the full examination of the authorities upon this question, let us examine the first question involved in the principal case a little more fully. With reference to this point Mr. Parsons says, "Whether a partner has or has not a right to terminate the partnership at his pleasure, it is certain

that an assignment by one partner, of all his interest in the joint property, to the other partner or partners, operates at once the withdrawal of the assignor and a dissolution of the firm. For, here the other partners assent to the transfer, by their acceptance of it; and, therefore, no question could be raised as to the right of the assignor." Pars. on Part. *400, citing *Heath v. Sansom*, 4 B. & Ad. 175; *Cochran v. Perry*, 8 W. & S. 262. To the same point see *Edens v. Williams*, 36 Ill. 252; *Cochran v. Perry*, *supra*; *Rogers v. Nichols*, 20 Tex. 719; *Collier on Part.*, § 101. See also, *McAdams v. Hawes*, 9 Bush 15, where a two years' lease at a stated rental by one partner to another of his interest in coal mines operated by the firm, the lessor thenceforth ceasing to act as partner and to participate in the business, was considered as operating either to dissolve the partnership absolutely, or, with the assent of the members, to suspend it during the continuance of the lease.

The case of *Taft v. Buffum*, 14 Pick. 322, cited in the principal case, was an action on a promissory note to which the defendants pleaded in abatement, that if they made any such promise it was with Horace Buffum as a joint promissor. It appeared in evidence that Buffum had conveyed to another member of the firm his interest in the whole personal and real estate of the establishments operated by the firm, but that notwithstanding this conveyance he still continued a member of the firm and transacted their business in the same manner as before, until the company failed; and it was held (*MORRIS, J.*, dissenting), that this conveyance did not, *ipso facto*, dissolve the copartnership, but was only evidence to show a dissolution.

In *Monroe v. Hamilton*, 60 Ala. 226, where the conveyance was by way of mortgage, the rule is laid down as follows: "An assignment by one partner to another of his interest in the partnership property is not *ipso facto* a dissolution of the partnership. Whether it

shall so operate depends on its terms, and the intention of the parties as from these it may be collected. If the withdrawal of the assignor from the copartnership is contemplated, if there is a termination of his authority and duty as partner and, as between him and the assignee, exemption from liability for the future transactions which may be had by the assignee in the prosecution of the original undertaking, it is as to them a dissolution. But when the assignment is intended as a mere security for a debt, and is to operate only on the share of the net profits of the assignor on a settlement of the partnership transactions at the expiration of the partnership, and he remains bound to all duties as partner, bound to contribute time, labor and skill to the prosecution of the common undertaking, it will not operate a dissolution, not even as between the partners themselves." *Taft v. Buffum*, *supra*, and *Buford v. Neely*, 2 Dev. Eq. 481, are cited. See also, *Matter of Shepard*, 3 Benedict 347.

An attentive perusal of the principal case and of the cases above cited will, it is believed, convince the reader that the quotation above made from Parsons on Partnership is to be received with some qualifications, and that the decision of the principal case is correct. Where nothing appears to qualify the effect of a transfer absolute in form, the assignment by one partner of his interest in the firm assets, whether to another partner or to a third person, being *prima facie* evidence of a dissolution, is undoubtedly sufficient to establish the fact of dissolution; and the great majority of cases of assignment by one partner are of that nature; but that all transfers are not of that nature seems clear, and where the evidence shows that it was not intended to dissolve the partnership and the nature of the transfer is not incompatible with its continued existence, there seems to be no rule either of law or public policy that will prevent the continued existence of the firm.

M. D. EWELL.

Supreme Court of Pennsylvania.

PHILADELPHIA AND READING RAILROAD CO. v. STICHTER.

A railroad company has the right, by virtue of its implied powers, and without direct authority being given it in its charter, to borrow money and issue obligations therefor.

A railroad company, without any direct authority by the terms of its charter to borrow money, propose to raise funds by issuing irredeemable bonds at a large discount which were not to be entitled to interest until after the common stock had received a dividend of six per cent., were then to take all revenues up to six per cent., and were then to rank *pari passu* with the common shares for further dividends: *Held*, that the right to issue such bonds was within the implied powers of the corporation, and not *ultra vires*.

Where interest is payable only on a contingency a contract stipulating for its payment at a rate greater than six per cent. is not usurious.

Although a court of equity will not usually decree a specific performance of a contract for the sale of bonds, yet if the proceeding be an amicable one, and be purely for the purpose of testing the right of the defendant to execute the bonds, the court will enter such a decree, if they are of opinion that defendant has such right.

MERCUR, GORDON and STERRETT, JJ., dissent.

BILL by Joseph L. Stichter, in the Court of Common Pleas of Berks county against the Philadelphia and Reading Railroad Company, for specific performance of its contract to execute and issue certain "deferred income bonds," in form as follows:

"PHILADELPHIA AND READING RAILROAD COMPANY.

DEFERRED INCOME BONDS.

Total issue, \$34,300,000.

This is to certify, That ——— of ——— entitled to ——— of the deferred income bonds of the Philadelphia and Reading Railroad Company. Transferable only upon the books of the said company in person or by attorney duly authorized according to the rules established for that purpose, and on surrender of this certificate.

This certificate is one of an issue of \$34,300,000, all of which issue are irredeemable, and are entitled to interest up to six per cent. only after a dividend of six per cent. in each year shall have been paid on the common shares of the said company, and thereafter the right of this issue of deferred income bonds to further interest shall rank *pari passu* with the declaration of further dividends upon the common shares of the said company.

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Witness the seal of the corporation and the signatures of the president and treasurer, at Philadelphia, this _____ day of _____ A. D. _____."

The company demurred; the demurrer was overruled, and, the company electing to abide by its demurrer, a decree was rendered that it issue to complainant the bonds he had subscribed for upon his paying for them. The company then appealed, assigning for error the action of the court in not sustaining the demurrer and dismissing complainant's bill.

George F. Baer, for appellant.

Isaac Hiester and James E. Gowen, for appellee.

The opinion of the court was delivered by

PAXSON, J.—We are in no doubt as to the power of the Philadelphia and Reading Railroad Company to issue the "deferred income bonds" described in this bill. So far as the mere borrowing of money is concerned it is not necessary to look into the charter of the company for a grant of express powers. It exists by necessary implication. As a general proposition the right of private or trading corporations to issue promissory notes, bonds or other evidences of indebtedness, unless restrained by their charters or the law of the land, may be conceded. The reason is plain; such corporations are organized for the purposes of trade and business, and the borrowing of money and issuing of obligations therefor are not only germane to the objects of their organization but necessary to carry such objects into effect: *City of Williamsport v. Commonwealth*, 3 Norris 487; see also *Reinboth v. Pittsburgh*, 5 Wright 278; *Watts's Appeal*, 28 P. F. Smith 370. I will not pursue the subject further; it would be a waste of time.

There being no objection therefore on the ground of want of power, is there anything in the form of the transaction to render it *ultra vires*? We learn from the pleadings that in May 1880, the company failed and passed into the hands of receivers; that at the time of such failure it had a floating or unfunded debt of upwards of \$10,000,000; that a large amount of property, mainly stocks and bonds of great value, had been pledged to secure said debt, and that said stocks and bonds were subject to the risk of being sold at forced sales at a great sacrifice; that the president and managers

of the company, in order to pay this floating debt, and thereby regain possession of the collaterals, determined to ask the stockholders to contribute \$10,000,000 for such purpose, for which they proposed to give them \$84,800,000 of deferred income bonds on which interest is to be deferred to a dividend of six per cent. on the common stock of the company, and thereafter to take all revenues up to six per cent., and then to rank *pari passu* with the common shares for further dividend.

It will thus be seen that the stockholder who advances \$15 receives a bond for \$50, which is irredeemable, and which is not entitled to interest until after six per cent. has been paid upon the common stock.

The objections that have been made to this scheme are twofold: First, that it is usurious; and second, that the transaction is not a borrowing of money, but the issuing of a deferred stock, which is beyond the power of the company.

It is sufficient to say in regard to the first objection that as the interest on the "deferred income bonds" is payable only upon a contingency, the contract is not usurious. *Non constat* that the company will ever pay anything to this class of bondholders. The contingency which will entitle them to interest may never arise, and is reasonably certain to be postponed for a considerable period. There is, therefore, no contract for the payment of more than legal interest. It is settled law that where the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious: *Spain v. Hamilton, Adm'r*, 1 Wallace 604; *Lloyd v. Scott*, 4 Peters 205. This point does not need elaboration.

The second objection is equally without merit. The bonds in question are not deferred stock either in form or substance. They are certificates of indebtedness under the seal of the company, with a recital that they are irredeemable; that they are entitled to no interest until after the common stock has received six per cent., and after that to come in *pari passu* with said common stock. They more nearly resemble a perpetual loan, with the interest indefinitely postponed. The holders would certainly have no rights as stockholders.

It is urged, however, that this transaction is not a borrowing of money within the implied powers of the company; that the meaning of the word "borrowed" as applied to moneyed transactions

involves an obligation to return the sum or thing borrowed. This is a narrow view of the subject. It is true we often use this word in the sense of returning the thing borrowed in specie, as to borrow a horse. But it is not limited to this sense.

Among the definitions given by Webster are the following: First. "To take or receive from another on trust, with the intention of returning or giving an equivalent, therefor;" and second, "to take from another for one's own use; to adopt from a foreign source; to appropriate; to assume." We need not give the apt illustrations with which the learned lexicographer adorns his text. While the borrowing of money is usually accompanied with a contract for the return of the principal at a stated time, it is not always or necessarily so. The object of loaning money is to obtain a return in the shape of interest. The interest is the consideration for the loan, the hire or price which is paid for the use of it. If I agree to pay \$60 for the use of \$1000 for one year, it is a borrowing of money. It is equally so if I contract at the same rate for the use of it for ten years. Is it any the less so when the contract is perpetual and the loan irredeemable? The equivalent is paid annually in the shape of interest.

We do not think trading corporations any more than individuals are restricted in their moneyed transactions to the narrow meaning of the word "borrow." In its broader sense it implies a contract for the use of money. The terms of the contract are within the control of the contracting parties so long as they keep within the law. I see no legal objection to a contract for a perpetual loan. Such contract implies the voluntary advance of a sum of money, repayment of which is not to be demanded, presumably for some benefit or advantage to the lender. Such transactions are common in England, and are not unknown in this country. They are referred to in *Union Canal Company v. Antillo*, 4 W. & S. 556, and in the *Appeal of the Zoological Society*, 38 Leg. Int. 403. I am informed that the annuity bonds of the Lehigh Valley Railroad Company are irredeemable. So long as the company pays the interest, the principal is not demandable. If the Reading Railroad Company may not accept money from its stockholders as a perpetual loan, I am unable to see how it could accept it as a gift.

It is observed that the borrowing of money is not the exercise of a corporate franchise, or a power that is denied to the citizen. Where a corporation seeks to exercise its franchises as when it

attempts to take private property for public use by virtue of the Commonwealth's right of eminent domain, we have a case in which if the right is not expressly given it is denied.

We have the question remaining whether the contract should be enforced in this proceeding. The bill was filed by a stockholder of the Philadelphia and Reading Railroad Company, setting forth the failure, the existence of the large floating debt referred to, and that in order to pay this floating debt, the president and managers "determined to ask the stockholders to contribute a sum sufficient for such purpose in consideration of the company agreeing to pay yearly a certain percentage on the sum advanced, in case the surplus earnings, after paying interest on debt and six per cent. dividends on stock, should be sufficient for the purpose."

The bill then set forth the details of what is referred to as the "deferred bond scheme;" that bonds to the amount of \$19,655,000 have been subscribed for by the shareholders, and the residue by the bondholders of the company; that a sum exceeding \$1,850,000 has been paid to the receivers on account of said subscription; that the stockholders of the company, by the vote of a large majority, have approved of the plan; that the complainant, who is a holder of a thousand shares of the stock, subscribed for and bound himself to take and pay for his quota of said stock, viz.: bonds to the amount of \$50,000, but that the company has failed and refused to perform its part and issue said bonds, although the plaintiff tendered full and complete performance on his part, of the contract. The prayer of the bill is for specific performance.

The company demurred to the bill upon the single ground that the plaintiff had not by said bill shown that said company had a legal right to execute and issue the bonds referred to, and further elected to abide by its demurrer.

As a general rule, a court of equity will not enforce specifically a contract relating to personalty. The reason is that for the breach of such contract an action at law furnishes an adequate remedy: *McGowin v. Remington*, 2 Jones 56; *Foll's Appeal*, 10 Norris 434; *Appeal of the Zoological Society*, 38 Leg. Int. 403.

We need not discuss the question how far an action at law would be an adequate remedy for a breach of this contract, nor to what extent the plaintiff would be injured by the refusal of an insolvent corporation to accept his money. The case presents other questions of higher importance.

If this were in point of fact an adverse proceeding, and the defendant company were resisting the enforcement of this contract, we would hesitate to make a decree. But the proceeding, whatever may be its form, is evidently an amicable one for the purpose of settling the legal rights of the parties.

In this respect it closely resembles an amicable action with a case stated. The demurrer admits all the facts alleged in the bill, and suggests only the supposed illegality of the "deferred bond scheme," with a declaration of submission to the ruling of the court. That the plain object of the proceeding is to obtain the decree of this court upon the validity of the bonds is not an objection, in view of the fact that the case is a *bona fide* one, with real parties having an actual present interest. And we can see substantial reasons why this question should be put at rest by the decision of a court whose decree shall be final. The property of the Reading Railroad Company is of enormous value, and its development enters largely into the business and prosperity of the city of Philadelphia and state at large. Unless some relief can be speedily afforded, by which its large unfunded debt can be liquidated, the interests of its stockholders, and, to some extent, of bondholders, must be sacrificed. The ruin of such a property would be a public calamity the extent of which is difficult to measure. The "deferred bond scheme" was intended to meet this difficulty. We have nothing to do with its wisdom. That is a matter which concerns only those whose interests are to be affected by it.

It is enough for us to know that it comes to us with the approval of the president, the board of managers, and a large majority of the stockholders of the company. As we are unable to see that it conflicts with any rule of law or public policy, we will not be astute to find reasons for refusing a decree, particularly as no question has been raised as to the jurisdiction. And even if there had been, the Act of Assembly which expressly confers upon courts of equity the supervision and control of corporations would be ample.

If, as the bill avers and the demurrer admits, the stock and bondholders of this company are willing to advance the sum of \$10,000,000 to save their valuable property from ruin, we see no sufficient reason why they should not be permitted to do so. It would not be difficult to demonstrate that it might be their interest to make such advance even if the money were donated. That they have reserved the chance of getting some of it back in the future

in the shape of interest does not detract from the legality of the scheme.

The decree is affirmed, and the appeal dismissed, at the costs of the appellants.

MERCUR, J.—I am constrained to dissent from the judgment of the majority of this court. I consider it fraught with mischief reaching far beyond this particular case. It not only affirms the existence of a power not found in its charter, but one in clear conflict with the general law of the Commonwealth.

A corporation is the mere creature of the law. It cannot exercise any powers other those expressly conferred or necessarily implied in furtherance of the object of its creation. All powers not so given are withheld. It is not sufficient that the officers or a majority of the stockholders of a private corporation believe its interests may be advanced by the exercise of additional powers. What the Commonwealth has not given to it can only be obtained by virtue of legislative action. Power manifestly doubtful should never be recognised by judicial construction. If not given by plain words or by necessary implication we should declare it not to exist: *Bank of Pennsylvania v. Commonwealth*, 7 Harris 144; *Pennsylvania Railroad Co. v. Canal Commissioners*, 9 Id. 9; *Commonwealth v. Franklin Canal Co.*, Id. 117; *Same v. Erie & Northeast Railroad Co.*, 3 Casey 339; *Spahr v. Farmers' Bank*, 13 Norris 432.

Whether this be simply a scheme to create and sell the "deferred income bonds" described in the bill, or whether, as seems to be the fact, it be a device to borrow money from partial friends at an exorbitant rate of interest, a court of equity should not lend its aid in furtherance of either object. No specific power to create and dispose of such bonds is found in the charter. It is contended that it arises under an implied power to borrow money; that the whole scheme is made lawful under this implied power. The claim here, however, does not stop with the assertion of a power to borrow money at a legal rate of interest. It is blended with the enforcement of an agreement that for each fifteen dollars borrowed the corporation shall pay interest on fifty dollars; in other words shall pay twenty per cent. interest on all money so borrowed.

This is the specific contract which we are called on to enforce. Not that the company may voluntarily pay this usurious interest, but by decree of this court shall pay it. It is intimated, however,

that the company will probably never be able to pay this interest, and this decree will be harmless. Such intimation rests on some assumed principle of equity that I am free to confess I do not understand. If the scheme be so uncertain of ever yielding any return it is one of gambling, to which the hand of a chancellor should never be extended.

The attempt is gravely made to maintain the agreement of the company by asserting that a corporation, like a natural person, may carry on its legitimate business by all legal and necessary means not prohibited by law or its charter. We may concede all this, yet the question before us is whether it may inaugurate business not legitimate, and carry it on by illegal means prohibited by law and by its charter. Can it truthfully be said the charter ever contemplated that the corporation should agree to pay twenty per cent. to such of its stockholders as see proper to lend it money, and then arrange with a person with whom this agreement was made, to procure a decree enforcing specific performance of the contract?

In case of a private partnership composed of many persons, if a majority of them should agree to borrow money for the purpose of carrying on the business of the firm, it would not for a moment be contended that one lending the money could, either at law or in equity, compel the firm to pay that usurious interest. The attempt here is not to give to a corporation powers equal to those of natural persons to make a binding contract but much greater powers. The restrictions heretofore recognised as applicable to the powers of a private corporation are to be disregarded by the affirmation of this decree. I therefore dissent.

GORDON and STERRETT, JJ., concur in this opinion.

Does a corporation possess the same power of raising money to enable it to accomplish its purposes that a natural person possesses? Assistant Vice-Chancellor SANDFORD says: "A corporation, in order to obtain its legitimate objects may deal precisely as an individual may who seeks to accomplish the same ends:" *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280. Subsequently Judge SELDEN said: "This doctrine entirely overlooks that manifest

distinction between corporations and natural persons upon which so many of the cases proceed. * * * It assumes that corporations must be specially restrained to prevent their exerting the same power as individuals. This is the direct opposite of the true doctrine:" *Curtis v. Leavitt*, 15 N. Y. 9-268. 'This is sound. The statement that a corporation, in order to accomplish its objects, "may deal precisely as an individual may who seeks to accomplish the same ends," is mani-

fastly too broad; for, if true, a railway, banking or other company desiring to raise money may deal in grain or stocks upon the exchanges. It might raise money by "speculating in cotton, in flour or other commodities with a view of obtaining the necessary means from the profits of the trade." Per **SALDEN, J.** Certainly an individual in want of funds is at liberty so to raise them. A rule so broad conflicts with the well-established limitation of corporate power to corporate purposes. The true principle is, that a company may raise money by such means only as are expressly or by implication authorized by its charter, among which means the power of borrowing is implied.

Thus implied power of borrowing does not strike one objectionably. An individual may borrow money; a firm may borrow it. "A simple association of merchants to build an exchange, could, if they so agreed with each other, very appropriately borrow money in furtherance of the object; and why can they not if they take the principal power under a charter from the government, which enables them to act as a single person and with a collective will?" Per **COMSTOCK, J.**, in *Curtis v. Leavitt*, 15 N. Y. 9, 64. There is no good reason why a corporation should not possess the power, and that it does possess it is well established by many decisions. See *Beers v. Phenix Glass Co.*, 14 Barb. 358; *Partidge v. Badger*, 25 Id. 146; *Clark v. Tutcomb*, 42 Id. 122; *Commissioners of Craven v. A. & N. C. Railroad Co.*, 77 N. C. 289; *Tucker v. City of Raleigh*, 75 Id. 267; *Barry v. Merchants' Exchange Bank*, 1 Sandf. Ch. 294; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Smith v. Law*, 21 Id. 296; *Nelson v. Eaton*, 26 Id. 410; *Bradley v. Ballard*, 55 Ill. 413; *Lucas v. Pitney*, 27 N. J. L. 221; *Mobile, &c., Railroad Co. v. Talman*, 15 Ala. (N. S.) 474; *Moss v. Harpeth Academy*, 7 Heisk. 283; *Cx-*

ford Iron Co. v. Spradley, 46 Ala. 98; *Ala. G. L. I. Co. v. Cent. A. & M. Ass'n*, 54 Id. 73; *Bank of Chillicothe v. Chillicothe*, 7 Ohio 415; *Ridgway v. Farmers' Bank*, 12 S. & R. 256; *Magee v. Mokelumne, &c., Co.*, 5 Cal. 258; *Union M. Co. v. Rocky Mt. Bank*, 2 Col. 256; *Hamilton v. New Castle, &c., Railroad Co.*, 9 Ind. 359; *Rockwell v. Elkhorn Bank*, 13 Wis. 653; *Fay v. Noble*, 12 Cush. 1; *Commercial Bank v. Newport Manuf. Co.*, 1 B. Mon. 14; *Holbrook v. Basset*, 5 Bosw. 147; *Furniss v. Gilchrist*, 1 Sandf. Superior Ct. 57; *Bank of Australasia*, 6 Moo. P. C. 152, 193, 195; *Forbes v. Marshall*, 24 L. J. Exch. 305. See also, *In re International L. I. Ins. Co.*, L. R., 10 Eq. Cas. 312; *Australia, &c., Co. v. Mounsey*, 4 K. & J. 733; *In re German M. Co.*, 4 DeG., M. & G. 19.

At various times the courts have specified the express powers to which the implied power of a company to borrow may be referred. Thus *Lucas v. Pitney*, *supra*, refers it to the express power to contract debts. "If it (the corporation) may contract debts, it would seem clear," say the court, "that it may enter into obligations to pay those debts, or borrow money for that purpose." So, also, in *Bank of Chillicothe v. Chillicothe*, *supra*: "And really I cannot see," said the writer of the opinion, "the great difference, whether the corporation shall be indebted to A. for labor in repairing streets or buildings, or to B. for money borrowed to pay A. for this same labor; the moral obligation to pay would be the same in either case." It is also said that this power "would seem necessarily incident to every corporation whose business involved the expenditure of large sums of money, and often upon sudden and unforeseen contingencies."

In *Curtis v. Leavitt*, *supra*, the power to borrow, it was declared, might be implied from an express power gave in bank to receive deposits. But Judge

SELDEN thought that no power to borrow for a definite and fixed time could be so implied since the deposits were substantially call loans. It was also intimated that an express power to deal in exchange implies a power to borrow. And *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280, proceeds upon the theory that an implied power to borrow results from an express power to purchase and to build.

Against the existence of the power it has been urged that money borrowed for a proper corporate purpose might be diverted to an illegitimate purpose. "It may be borrowed to build a hospital and expended to build a theatre," said Judge SELDEN (*Curtis v. Leavitt*, 15 N. Y. 9, 268, 269). But the same might be said of a company's capital, its surplus cash, or any of its property. It certainly is no valid objection when a company makes "calls" upon its stockholders, or decides not immediately to distribute but to hold and employ its surplus earnings, to say that the proceeds of such "calls" or the amount of the surplus may be devoted to other than corporate purposes. An inchoate attempt so to divert such funds is enjoined by the state or the stockholders, and a completed diversion of corporate property from corporate purposes is ground for forfeiting the company's franchise. All these remedies are equally as efficacious to restrain the diversion of borrowed funds.

The power of borrowing money is not a franchise. It is a power belonging to every citizen. A franchise, on the other hand, is a special privilege conferred by government on individuals, and which does not belong to the citizens of a country generally by common right. "As well may it be said that the privilege of keeping their money in an iron safe is a franchise or power:" SHANKLAND, J., *Curtis v. Leavitt*, 15 N. Y. 9, 170.

The principal limitations to the power of a corporation to borrow will now be noticed.

LIMITATION I. Purpose.—The loan must be procured for corporate purposes. This proposition is so well established as hardly to need support by authority. *Davis's* and *Wilson's Cases*, L. R., 12 Eq. 516, 521, specially illustrate it. The objects of a building society were to raise a fund for the purpose of enabling its members to purchase freehold land or other real or leasehold estate; to erect suitable cottages and other buildings thereon; to provide the means for the profitable investment of small savings; and in cases of accidental death to relieve the widows and families of deceased shareholders by adding the interest and estimated profits of the current year on the withdrawal of their shares at the time of death.

The directors were authorized to borrow money "for the purposes of the society," and it was decided that this power was strictly limited to the purposes set forth above, and that persons who had lent money to the directors which was employed in a loan to another society, could not enforce their claims upon the winding up of the society, although it was also held that the official liquidator was not entitled, without payment of the money advanced, to deprive the lenders of their securities. See also, *In re Nat. F. B. B. Society*, *Ex parte Williamson*, L. R., 5 Ch. App. 309; and *Laing v. Reed*, L. R., 5 Ch. App. 4.

LIMITATION II. Amount.—It has been urged that a company could not borrow more than its capital stock. But *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 308, decided that the power of a company to borrow money is not limited to a sum equal to its unpaid capital, and further that when the capital stock should be fully paid in, the implied power to borrow did not cease. The court reasoned that an absolute restriction of the power to borrow to the amount of unpaid capital would extinguish the power of borrowing when

the capital stock was fully paid in, and that such a rule would entirely deprive incorporated religious, literary and charitable societies, which usually have no capital stock, of all power to borrow.

Again, it has been urged that a corporation is limited to borrowing a sum sufficient to accomplish the particular purpose for which the loan is sought. Judge SELDEN, in *Curtis v. Leavitt*, *supra*, being of opinion that a corporation ought to be confined simply to running directly in debt for the materials, labor, &c., which it might need to carry out its purposes, said, "if permitted to borrow, there is no limit but a voluntary estimate, which may greatly exceed the amount required." To this it may be replied that the excess over the sum actually needed either can or cannot be profitably employed. If it cannot be profitably employed, this is in itself a guaranty that it will not be borrowed. Neither men nor corporations borrow money only to pay interest while the loan is idly stored in a safe. On the other hand, if it can be profitably employed then the fund usable for corporate purposes—no matter whether used or not for the particular corporate purpose for which the loan was made—is augmented by the excess, and it will be promptly and profitably employed. If the excess be put to any other than corporate uses, the company is restrainable at law. Where then is the injury resulting from lending a company more money than it needs for the particular purpose of the loan?

No general rule can be formulated as to the amount which a corporation may borrow. But there are always one and sometimes two very effective limitations upon its power in this respect.

1. Statutory limitations of amount. These are frequently imposed by charter or general laws. Thus in *Ossipee H. & W. M. Co. v. Canney*, 54 N. H. 295, a statute limited the right of a corporation to contract liabilities exceeding half its

capital stock actually paid in and unimpaired, but since the section of the statute following the prohibition provided that the directors should be liable individually for any excess of liabilities incurred above half the capital stock, it was decided that the prohibition was merely directory, and that debts contracted beyond the limit were valid against the company. It was also decided that a corporation having received the benefit of contracts made beyond the limit was estopped from repudiating them upon the ground that it had violated the statute in contracting. See also, *Gordon v. Sea F. L. A. Soc.*, 1 H. & N. 599.

It has been decided that where a company's power to borrow upon debentures is expressly limited to a specific sum, a debenture issued in excess of such sum is void *ab initio*. PAGE WOOD, V. C.: "I think his (the excessive debenture holder's) case particularly unfortunate; but the whole money was raised, and I see no way of relieving him. I do not find that Parliament had given to parties dealing with companies the means of knowing how much money a company had raised. Every debenture should carry on it a statement of the amount of money that has been raised. How far the directors who do these unconscionable things may or may not be personally answerable it is not for me now to consider."

"As (the) debenture was void *ab initio*, and the directors did not, as they ought to have done, put him (the holder) in a proper position, by issuing to him a new debenture, I cannot hold that the circumstances of the company afterwards having means can enable me to treat that which was void *ab initio* as an existing security." *Fontaine v. Carmathen R. Co.*, L. R., 5 Eq. 316. But to this it appears to be a good reply, at least in American courts, to say that the company having received and used the proceeds of the sale of the void de-

benture is estopped from setting up the nullity of the debenture in defence to a suit based upon it: *Bradley v. Ballard*, 55 Ill. 413. See also *Monument N. Bank v. Globe Works*, 101 Mass. 57; *Bissell v. Railroad*, 22 N. Y. 289; *In re Pooley Hall Colliery Co.*, 21 L. T. (N. S.) 690; *N. Y. & N. H. Railroad Co. v. Schuyler*, 34 N. Y. 30.

2. Natural laws of trade. By this is meant those limitations upon the power of all persons, including companies, to borrow, which arise out of the sagacity of money-lenders, who do not commonly advance more money to borrowers than they can repay. "The laws of trade," to quote Vice-Chancellor SANDFORD, in *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 309, "have placed an impassable barrier to the power of corporate borrowing, in the tendency of such institutions to make an improvident use of exuberant means, and in the caution and prudence of capitalists. It is utterly impossible for a corporation with a known limited capital to accumulate by means of its credit the gigantic property and power which the imagination of the counsel portrayed."

LIMITATION III. *Time*.—It was objected in *Barry v. Merchants' Express Co.*, 1 Sandf. Ch. 298, that if the company never paid its bonds, they constituted in fact a funded debt, "as irredeemable, to all intents and purposes, as the national debt of Great Britain." The objector was a creditor of the company, and the court questioned his right to moot the point, it being one more appropriate to the interference of the sovereign power of the state, but said that the resemblance between the bonds and public stocks was "very faint." The bonds were printed or engraved, and had coupons attached for convenience in the collection of interest. There the likeness ceased. These bonds were sealed obligations of the company; bonds, in the technical sense of the word; and secured, not by the public

faith or the mere corporate liability, but by mortgages on real estate: per SANDFORD, A. V. C., p. 308, 309.

This case, the principal case, and that of *Taylor v. Philadelphia and Reading Railroad Co.*, *infra*, are believed to be the only cases where the time for which a corporation may effect a loan has been questioned or discussed. It is believed, however, that there is a clear limitation of the time for which a loan may be negotiated by a company—a time limitation arising out of the very nature of a loan. Perhaps this will appear more clearly after an examination of the decision in the principal case.

First. Is such a transaction as that designated in the principal case as the "deferred bond scheme," a "borrowing" or loan of money?

It is true that one meaning of the verb "borrow," is "to use as one's own that which belongs to another; to appropriate:" [*Worcester*]; "to take from another for one's own use; to adopt from a foreign source; to appropriate; to assume." [*Webster*.] But "borrow" in the sense of appropriation without an intention to return, is always and only predicated of words, phrases, rites, ceremonies and things of no pecuniary value. "These verbal signs they sometimes borrow from others." [*Locke*.] "Rites borrowed from the ancients." [*Macauley*.] "To borrow good words and holy sayings." [*Milton*.] "The two idioms (English and Norman) sometimes borrow from others." [*Blackstone*.] Nothing whose worth is estimable in dollars and cents is ever "borrowed" in this sense. Indeed, such a "borrowing" of money or property is more like larceny than loan, and the use of the word "borrow" in this sense, with reference to the implied power of a company to secure a loan of money, is simply sophistry—sophistry so palpable and puerile as hardly to merit exposure.

A loan or a "borrowing" contem

plates a return of the thing borrowed. "A loan of money implies that the borrower may expend it, being bound only to return an equivalent sum:" Abbott's Law Dict., "*Loan*." "A promise to return the money borrowed is, indeed, one among the ordinary indications of a loan." Per Mr. Justice JOHNSON in *Nichols v. Fearson*, 7 Pet. 109.

Lord REDESDALE: "It is essential to a loan that the money is in all events to be repaid with interest by the borrower himself, or out of his funds:" *Lukey v. O'Donnel*, 2 Sch. & Lef. 470.

Chief Justice FOLGER, of New York: "The idea of borrowing is not filled out unless there is in the agreement therefor a promise or understanding that what is borrowed will be repaid or returned; the thing itself, or something like it of equal value, with or without compensation for the use of it in the meantime. To borrow is the reciprocal action with to lend; and to lend or to loan, say the dictionaries, is the parting with a thing of value to another for a time fixed or indefinite, yet to have some time an ending, to be used or enjoyed by that other, the thing itself, or the equivalent of it, to be given back at the time fixed, or when lawfully asked for, with or without compensation for the use as may be agreed upon:" *Kent v. Quicksilver Mining Co.*, 78 N. Y. 177; see, also, *Coleman v. State*, 32 Ala. 582.

This "deferred bond scheme" came before the United States Circuit Court on a stockholder's bill to restrain the issue of these and almost a hundred and fifty millions of dollars more "perpetual bonds," in *Taylor v. Reading Railroad Co.*, 7 Fed. Rep. 386. As to its being a loan or "borrowing," Circuit Judge McKENNAN said: "Has it then this character? I think plainly not. It does not propose to create the relation of debtor and creditor between the defendant and the subscribers. The money obtained by the defendant could not be regarded as borrowed, because that im-

plies reimbursement, and it is not demandable by the subscribers or payable by the defendant. It has not the essential and distinguishing qualities of a loan. It contemplates a stipulation that the subscribers, in consideration of the sums paid—not lent—by them, shall be entitled to receive, in a remote and uncertain contingency, a portion of the defendant's earnings, to be measured by a certain rate per cent. upon three times the sums paid by them, and after that shall participate with the common shareholders in the division of the residuary earnings. By what allowable definition of a loan or borrowing such a transaction can be embraced, I am at a loss to conceive. Nor will the fact that it is to be evidenced by the sealed writing of the defendant change its inherent character and bring it within the range of a power to which it is not otherwise referable.

"In one respect, and in one only, does the plan proposed resemble a loan, and that is in the result to be attained. They are both expedients for raising money, but the method of accomplishing this result is of the essence of the power of the corporation. If its employment has not explicit legal sanction, it cannot be made available. If the defendant were offered a rental for its property amply sufficient to relieve it from the burden of embarrassment with which it is now struggling, unless it could show that its legislative creator had endowed it with a right to make a lease, it could not accept such relief: (*Thomas v. West Jersey Railroad Co.*, 101 U. S. 82); and although it has power to acquire real estate for all necessary corporate purposes, no one would maintain that it could lawfully enter into a contract for the purchase of real estate merely to resell, and thereby realize large gains. Authority to raise money by borrowing does not imply the use of another and different method of raising it, however well adapted to the end it may

be. Even in the prospectus issued by the president of the defendant (Exhibit 1), the proposed issue of "deferred bonds" is not in any aspect treated as a loan, and the system is correctly stated to be new in the United States, and to have been frequently adopted in Great Britain with great benefit to the companies and to subscribers. But we know that in Great Britain this "system" is expressly authorized by statute, and hence it may be assumed that such legislation was deemed necessary to legalize a resort to it. Is not this suggestive of the inference that, although it has been proved to be of great benefit in Great Britain, it is "new" in this country because it has been regarded as without necessary legislative authorization.

"I am, therefore, of opinion that this issue of 'deferred bonds,' as proposed, is without warrant of law." * * *

BUTLER, D. J., concurring, said: "Every admissible definition of the term borrow or loan, as applied to money and commercial transactions, embraces an obligation to return the property borrowed. A loan of money is universally understood to be the delivery of a certain sum to another, on contract for its return, generally with interest, as compensation for its detention and use. To call this payment of money to another, who is to receive and permanently retain it as his own, in consideration for an annual benefit or profit, a *loan*, would seem to be a plain misuse of language."

"There is no such thing known to commerce or transactions in money, as an irredeemable loan in the sense here involved. Governments have issued obligations without provision or stipulation for repayment of the principal borrowed; but such obligations are redeemable at pleasure. Running, however, for an indefinite time, with no power in the holder to exact payment, they have come to be regarded as 'irredeemable,' and an investment in them

is, therefore, treated and described, not as a loan, but as the purchase of an annuity or stock. Aside, however, from the abstract considerations involved in defining the term *borrow* or *loan*, the corporate powers of the defendants to borrow money must be held to apply only to such methods of borrowing as fall within the ordinary sense of the term—as understood by the community, and illustrated in commercial transactions. Applying this test to the proposition here under consideration, it becomes plain that the transaction contemplated is not a loan."

The nature of the transaction is thus stated by Judge BUTLER: "The certificate proposed to be issued would vest in the owner a joint interest with the common stockholder in the capital or property of the corporation, an interest purchased with his money, the earnings of which would be paid to him in dividends. In every essential respect, therefore, he would be a stockholder. The circumstance that he could not vote for directors would not change the character of his interest, or the nature of his relation to the company and its property. His situation would be similar to that of a silent partner in a commercial firm. The proposition, therefore, is for the sale of interests in the capital of the corporation—a sale of shares, shorn of the privilege of voting, with the right to dividends regulated by contract."

The conclusion is that there is a time limitation upon the implied power of corporations to borrow money; because a "borrowing" of money implies a return, which must of course take place at some time, prescribed or possible of ascertainment.

Second. Is not such an issue of "irredeemable bonds" unconstitutional, as impairing the contract between the company and such of the stockholders as do not assent to it?

What are the rights of bondholders,

creditors and stockholders in the net earnings of a company? They are these: Bondholders and other creditors, secured or otherwise, are entitled to be paid their interest, and the principal of such debts as are mature. Preferred stockholders (if there be any) are entitled to their dividends. And after all these are provided for, common shareholders have a right under their contract with the company to have the remainder of the net earnings distributed among them as dividends. These rights are vested, and unless power so to do has been reserved to, or constitutionally conferred upon, the company, it cannot divest or subtract from shareholders' rights without their consent.

"Shares of stock are in the nature of *choses in action*, and give the holder a fixed right in the division of the profits of a company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened, against the will of the owner than can any other right, unless power is reserved in the first instance, when it enters into the constitution of the right, or is properly derived afterwards from a superior law-giver." Per FOLGER, C. J., in *Kent v. Quicksilver Mining Co.*, 78 N. Y. 179; and see *Mechanics' Bank v. N. Y. & N. H. Railroad Co.*, 13 N. Y. 599-627. Yet this "deferred bond scheme" contemplates first a limitation of the dividends of common stockholders to 6 per cent. Then the surplus remaining after this is paid is to be used to pay 6 per cent. on these "bonds," and the holders of these are finally to share, *pari passu*, with the common stockholders any balance of the surplus profits remaining undistributed. By this plan the common shareholders, notwithstanding they have a clear right to the whole of the surplus profits of the company remaining after the matured claims of creditors and preferred shareholders are satisfied, are to be compelled

perpetually to share that surplus with the holders of these "deferred income bonds." This deprives such shareholders of a portion of the profits to which they are entitled under their contract with the company to take its stock. It impairs that contract. It is unconstitutional, and the majority of the stockholders cannot bind any minority, however small, to any such agreement. The case is analogous to *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159. There the company was in need of funds, and a by-law was adopted providing that stockholders who should surrender their certificates and pay \$5 on each share of stock, should be entitled to the same number of shares of a preferred stock drawing 7 per cent. interest, to be paid out of the profits of the company. Any surplus thereafter was to be divided *pro rata* among common and preferred shareholders. The transaction was decided not to be a borrowing, and to be *ultra vires* of the company because it impaired the contract rights of the common shareholders.

The unconstitutionality of this "perpetual bond scheme" is the same, even considering it as a loan. It must be remembered that to borrow or to go in debt are but temporary expedients to accomplish corporate purposes. Subscribers for stock buy it in contemplation of the eventual payment of such debts as may be necessarily incurred by the company, so that interest shall cease to absorb profits which should be distributed as dividends. But by this scheme the company may become abundantly able to pay all its debts, and thus to stop the diversion of profits from dividends to interest, and still the profits distributable as dividends will be used for interest. This is in derogation of the shareholder's contracts. Their right is to have the debts paid so soon as is practicable, in order that they may themselves secure, in the shape of dividends what is paid to creditors as interest.

It is concluded, therefore, that stockholders have a right to have corporate debts paid as soon as practicable, in order that corporate profits may be distributed as dividends instead of being paid out as interest; and, further, that any diversion of profits agreed to be distributed as dividends is an unconstitutional impairment of the stockholder's contract, unless he consent to such diversion.

In the principal case some reliance is placed upon *Union Canal Co. v. Antillo*, 4 W. & S. 553. There a certificate of loan was issued in 1830 by a company, that there was due from it to Antillo, or her assigns, a certain sum, bearing interest at 6 per cent. per annum, payable quarterly on certain days, *the principal to be redeemable in the option of the company*, at any time after January 1st 1840; and further stating that it was issued under a resolution of the company, and that the holder would be entitled to convert the whole of said sum into shares of the capital stock of the company at any time previous to January 1st 1840.

It was decided that this created an annuity coupled with a power to redeem after January 1st 1840, the company alone having power after that time to determine when the loan shall be repaid, and that an action would not lie to compel payment of the principal against the will of the company, its affairs having terminated disastrously.

The *Antillo* case is distinguishable from the principal case. In the former the bonds were expressly redeemable at the option of the company. This option might be exercised, and a saving of interest effected for the stockholders at any time the company became able to pay its debts. Not so in the principal case. In it the bonds are irredeemable whether the company fail or flourish, and stockholders—whether the company is able to pay its debts or not—are always to have a portion of its surplus earnings dissipated in interest. They are, by the “deferred bond scheme,” left unprotected in the very respect wherein their rights were fully guarded by the *Antillo* contract.

The company in the *Antillo* case contemplated a redemption at its option, and so also did the court, for it said in deciding the case: “thus, if the rate of interest be reduced, it would be to the benefit of the company to open a new loan and repay the amount borrowed; but if there should be no change in the value of money, then it was to be at their option to continue the contract on the same terms.” This case is no authority for an irredeemable loan as against the company. The difference between the two contracts is clear, material and important.

ADELBERT HAMILTON

Chicago.

Supreme Court of Connecticut.

IN RE MARY HALL.

Under a statute providing that “the Superior Court may admit and cause to be sworn as attorneys such persons as are qualified therefor agreeably to the rules established by the judges of said court, and no other person than an attorney so admitted shall plead at the bar of any court of this state, except in his own cause,” a woman who has complied with the rules as to examination, &c., and found qualified, may legally be admitted as an attorney.

THIS was an application by a woman for admission to the bar of Hartford county. After having completed the prescribed term

of study she passed the examination required by the rules of the bar, and was recommended by the bar of the county to the Superior Court for admission, subject to the opinion of the court upon the question whether as a woman she could legally be admitted. The Superior Court reserved the case for the advice of the Supreme Court.

J. Hooker and T. McManus, for applicant.

G. Collier, *contra*.

The opinion of the court was delivered by

PARK, C. J.—The statute with regard to the admission of attorneys by the court is the 29th section of chapter 3, title 4, of the General Statutes, and is in the following words: "The Superior Court may admit and cause to be sworn as attorneys such persons as are qualified therefor agreeably to the rules established by the judges of said court; and no other person than an attorney so admitted shall plead at the bar of any court of this state, except in his own cause."

It is not contended, in opposition to the application, that the language of this statute is not comprehensive enough to include women, but the claim is that at the time it was passed its application to women was not thought of, while the fact that women have never been admitted as attorneys, either by the English courts or by any of the courts of this country, had established a common-law disability, which could be removed only by a statute intended to have that effect.

It is hardly necessary to consider how far the fact that women have never pursued a particular profession or occupied a particular official position, to the pursuit or occupancy of which some governmental license or authority was necessary, constitutes a common-law disability for receiving such license or authority, because here the statute is ample for removing that disability if we can construe it as applying to women, so that we come back to the question whether we are by construction to limit the application of the statute to men alone, by reason of the fact that in its original enactment its application to women was not intended by the legislators that enacted it.

And upon this point we remark, in the first place, that an inquiry of this sort involves very serious difficulties. No one

would doubt that a statute passed at this time in the same words would be sufficient to authorize the admission of women to the bar, because it is now a common fact and presumably in the minds of legislators, that women in different parts of the country are and for some time have been following the profession of law. But if we hold that the construction of the statute is to be determined by the admitted fact that its application to women was not in the minds of the legislators when it was passed, where shall we draw the line? All progress in social matters is gradual. We pass, almost imperceptibly, from a state of public opinion that utterly condemns some course of action to one that strongly approves it. At what point in the history of this change shall we regard a statute, the construction of which is to be affected by it, as passed in contemplation of it? When the statute we are now considering was passed it probably never entered the mind of a single member of the legislature, that black men would ever be seeking for admission under it. Shall we now hold that it cannot apply to black men? We know of no distinction in respect to this rule between the case of a statute and that of a constitutional provision. When our state constitution was adopted in 1818, it was provided in it that every elector should be "elegant to any office in the state," except where otherwise provided in the constitution. It is clear that the convention that framed and probably all the people who voted to adopt that constitution, had no idea that black men would ever be electors, and contemplated only white men as within any possible application of the provision, for the same constitution provided that only white men should be electors. But now that black men are made electors will it do to say that they are not entitled to the full rights of electors in respect to holding office, because an application of the provision to them was never thought of when it was adopted? Events that gave rise to enactments may always be considered in construing them. This is little more than the familiar rule that in construing a statute we always inquire what particular mischief it was designed to remedy. Thus the Supreme Court of the United States has held that in construing the recent amendments of the Federal Constitution, although they are general in their terms, it is to be considered that they were passed with reference to the exigencies growing out of the emancipation of the slaves, and for the purpose of benefiting the blacks: *Slaughter House Cases*, 16 Wall. 67; *Strander v. West Virginia*, 100 U. S.

Rep. 306. But this statute was not passed for the purpose of benefiting men as distinguished from women. It grew out of no exigency caused by the relation of the sexes. Its object was wholly to secure the orderly trial of causes and the better administration of justice. Indeed the preamble to the first statute providing for the admission of attorneys, states its object to be "for the well ordering of proceedings and pleas at the bar."

The statute on this subject was not originally passed in its present form. The first act with regard to the admission of attorneys was that of 1708, which was as follows: "That no person, except in his own cause, shall be admitted to make any plea at the bar without being first approved by the court before whom the plea is to be made, nor until he shall take in the said court the following oath," &c.: Col. Records, 1706 to 1716, p. 48. This act seems to have contemplated an approval by the court in each particular case in which an attorney appeared before it. The first act with regard to the general admission of attorneys appears in the revision of 1750, and is as follows: "That the county courts of the respective counties in this colony shall appoint, and they are hereby empowered to approve, nominate and appoint attorneys in their respective counties as there shall be occasion, to plead at the bar; * * * and that no person, except in his own case, shall make any plea at the bar in any court but such as are allowed and qualified attorneys as aforesaid." Thus the statute stood until the revision of 1821, when for the first time it took essentially its present form. Up to this time the word "person" had been used in this statute only in the clause that "no person" should be allowed to practice before the courts except where formally admitted by the court, a use of the word which of course could not be regarded as limited to the male sex, as women would undoubtedly have been held to be included in the term. The language of the statute as now adopted was as follows: "The county courts may make such rules and regulations as to them shall seem proper, relative to the admission and practice of attorneys; and may approve of, admit and cause to be sworn as attorneys, such persons as are qualified therefor, agreeably to the rules established; * * * and no person not thus admitted, except in his own cause, shall be admitted or allowed to plead at the bar of any court." The statute in this form passed through the compilations of 1835 and 1838, the revision of 1849 and the compilation of 1854, and appears, with a slight modification, in the

revision of 1866. The county courts had now been abolished, and the power to admit attorneys, as well as to make rules on the subject, had been given to the Superior Court; the expression "such persons" being preserved, and the provision that "no person" not thus admitted should be allowed to plead, being omitted.

The statute finally took its present form in the revision of 1875. It retains the provision that the Superior Court may make rules for the admission of attorneys, and provides that the court "may admit and cause to be sworn as attorneys *such persons* as are qualified therefor agreeably to the rules established," and restores the provision, dropped in the revision of 1866, that "no person other than an attorney so admitted shall plead at the bar of any court in this state, except in his own cause."

These changes, though not such as to change the meaning of the statute at any point of importance to the present question, are yet not wholly without importance. The adoption by the legislature of a revision of the statutes becomes, both in law and in fact, a re-enactment of the whole body of statutes; and though, in determining the meaning of a statute, we are not to regard it as then enacted for the first time, especially if there be no change in its phraseology, yet, where there is such a change, it follows that the attention of the revisers had been particularly directed to that statute, as of course also that of the legislature, and that with the changes made it expresses the present intent of both. Thus, in this case, it is clear that the revisers gave particular thought to the phraseology of the statute we are considering, and put it in a form that seemed to them best with reference to the present state of things, and decided to leave the words "such persons" to stand, with full knowledge that they were sufficient to include women, and that women were already following the profession of law in different parts of the country. The legislators must be presumed to have acted with the same consideration and knowledge. It would have been perfectly easy, if either had thought best, to insert some words of limitation or exclusion, but it was not done. Not only so, but a clause omitted in the revision of 1866 was restored, providing that no "person" not regularly admitted should act as an attorney, a term which necessarily included women, and the insertion of which made it necessary, if the word "persons" as used in the first part of the statute should be held not to include women, to give two

entirely different meanings to the same word where occurring twice in the same statute and with regard to the same subject-matter.

The object of a revision of the statutes is, that there may be such changes made in them as the changes in political and social matters may demand, and where no changes are made in a statute it is to be presumed that the legislature is satisfied with it in its present form. And where some changes are made in a particular statute and other parts of it are left unchanged, there is the more reason for the inference, from this evidence, that the matter of changing the statute was especially considered, that the parts unchanged express the legislative will of to day, rather than that of perhaps a hundred years ago, when it was originally enacted.

But this statute, in the revision of 1875, is placed immediately after another with regard to the appointment of commissioners of the Superior Court, the necessary construction of which, we think, throws light upon the construction of the statute in question. That act was passed in 1855, after women had begun, with general acceptance, to occupy a greatly enlarged field of industry, and some professional and even public positions; and it has been held, by the Superior Court, very properly we think, as applying to women, a woman having three years ago been appointed a commissioner under it. Its language is as follows: "The Superior Court in any county may appoint any number of persons in such county to be commissioners of the Superior Court, who, when sworn, may sign writs and subpœnas, take recognisances, administer oaths and take depositions and the acknowledgment of deeds, and shall hold office for two years from their appointment." Here the very language is used which is used in the statute with regard to attorneys. In one it is "any number of persons," in the other "such persons as are qualified." These two statutes are placed in immediate juxtaposition in the revision of 1875 and deal with kindred subjects, and it is reasonable to presume that the revisers and the legislature intended both to receive the same construction. It would seem strange to any common-sense observer that an entirely different meaning should be given to the same word in the two statutes, especially when in giving the narrower meaning to the word in the statute with regard to attorneys, we are compelled to give it a different meaning from that which the same word requires in the next line of the same statute.

We are not to forget that all statutes are to be construed, so far

as possible, in favor of equality of rights. All restrictions upon human liberty, all claims for special privileges, are to be regarded as having the presumption of law against them, and as standing upon their defence, and can be sustained, if at all by valid legislation, only by the clear expression or clear implication of the law.

We have some noteworthy illustrations of the recognition of women as eligible or appointable to office under statutes of which the language is merely general. Thus, women are appointed in all parts of the country as postmasters. The Act of Congress of 1825 was the first one conferring upon the postmaster-general the power of appointing postmasters, and it has remained essentially unchanged to the present time. The language of the act is that, "the postmaster-general shall establish post offices and appoint postmasters." Here women are not included except in the general term "postmasters," a term which seems to imply a male person; and no legislation from 1825 down to the present time authorizes the appointment of women, nor is there any reference in terms to women until the revision of 1874, which recognises the fact that women had already been appointed, in providing that "the bond of any married woman who may be appointed postmaster shall be binding on her and her sureties." Some of the higher grades of postmaster are appointed by the president, subject to confirmation by the senate, and such appointments and confirmations have repeatedly been made. The same may be said of pension agents. The acts of Congress on the subject have simply authorized "the president, by and with the advice and consent of the senate, to appoint all pension agents, who shall hold their offices for the term of four years, and shall give bond," &c. At the last session of Congress a married woman in Chicago was appointed, for a third term, pension agent for the state of Illinois, and the public papers stated that there was not a single vote against her confirmation in the senate. Public opinion is everywhere approving of such appointments. They promote the public interest, which is benefited by every legitimate use of individual ability, while mere justice, which is of interest to all, requires that all have the fullest opportunity for the exercise of their abilities. These cases are the more noteworthy as being cases of public offices, to which the incumbent is appointed for a term of years, upon a compensation provided by law, and in which he is required to give bond. If an attorney is to be regarded as an officer, it is in a lower sense.

We have had pressed upon us by the counsel opposed to the applicant, the decisions of the courts of Massachusetts, Wisconsin and Illinois, and of the United States Court of Claims, adverse to such an application. While not prepared to accede to all the general views expressed in those decisions, we do not think it necessary to go into a discussion of them, as we regard our statute, in view of all the considerations affecting its construction, as too clear to admit of any reasonable question as to the interpretation and effect which we ought to give it.

In this opinion CARPENTER and LOOMIS, JJ., concurred; PARDEE, J., dissented.

Although women have been admitted to the bar in several states under statutes somewhat similar to that of Connecticut, the foregoing is believed to be the only reported opinion in which such right to admission has been sustained, while there are at least four elaborate opinions in the reports denying such right. In the case of *In re Bradwell*, 55 Ill. 535, decided in 1869, the question arose under a section of the Revised Statutes of Illinois, providing as follows: "No person shall be permitted to practise as an attorney or counsellor at law * * * without having previously obtained a license for that purpose from some two of the justices of the Supreme Court. * * * No person shall be entitled to receive a license as aforesaid until he shall have obtained a certificate from the court of some county of his good moral character." Another section of the revised statutes provided that whenever any person was referred to in the statute by words importing the masculine gender, females as well as males should be deemed to be included, but that this rule should not apply when there was anything in the subject or context repugnant to such construction. The court held that women could not be admitted, LAWRENCE, J., who delivered the opinion, saying: "When the legislature gave to this court the power of granting licenses to practise

law it was with not the slightest expectation that this privilege should be extended equally to men and women. Neither has there been any legislation since that period which would justify us in presuming a change in the legislative intent. * * * We do not deem ourselves at liberty to exercise our power in a mode never contemplated by the legislature and inconsistent with the usages of courts of the common law from the origin of the system to the present day. But it is not merely an immense innovation in our own usages as a court that we are asked to make. This step, if taken by us, would mean that in the opinion of this tribunal every civil office in this state may be filled by women; that it is in harmony with the spirit of our Constitution and laws that women should be made governors, judges and sheriffs. This we are not prepared to hold. In our opinion it is not the province of a court to attempt by giving a new interpretation to an ancient statute to introduce so important a change."

Mrs. Bradwell appealed to the Supreme Court of the United States, which decided that the refusal to admit her to the bar was not a violation of any provision of the United States Constitution: *Bradwell v. The State*, 16 Wall. 130.

In the case of *In re Lockwood*, 9 N. & H. 346, decided in 1873, Mrs. Lock-

wood, a married woman, who had been admitted to the bar in the courts of the District of Columbia, applied for admission as an attorney in the United States Court of Claims. The court (Norr, J., delivering the opinion), held that married women were not entitled to admission at common law, and that in the absence of any statute or established precedents authorizing such admission, the court was without power to grant the application. Afterwards Mrs. Lockwood applied to the Supreme Court of the United States to be admitted to practise as an attorney, and her application was denied, the following being the entry on the record: "Upon the presentation of this application the chief justice said that notice of this application having been previously brought to his attention, he had been instructed by the court to announce the following decision upon it: By the uniform practice of the court, from its organization to the present time, and by the fair construction of its rules, none but men are admitted to practise before it as attorneys and counsellors. This is in accordance with immemorial usage in England and the law and practice in all the states until within a recent period, and the court does not feel called upon to make a change until such a change is required by statute or a more extended practice in the highest courts of the states." This case is unreported but is cited in the opinion in *Robinson's Case*, 131 Mass. 376, cited *infra*.

In *Goodell's Case*, 39 Wis. 232 (1875) the question arose under a statute providing as follows: "No person shall hereafter be admitted or licensed to practise as an attorney of any court of record in this state except in the manner hereinafter provided. To entitle any such person to practise as such attorney in the Circuit Courts of this state he shall be first licensed by order of one of the judges thereof made in open court, and no such order shall

be made until the person applying for such license shall have first been examined in open court, * * * nor unless such person be a resident of this state, more than twenty-one years of age and of good moral character. * * * Any person licensed by order of the court * * * shall be entitled to practise as attorney. By another statute it was provided "every word importing the masculine gender only may extend and be applied to females as well as males." Under these statutes a motion was made for the admission of an unmarried woman to the bar. The motion was denied, *RYAN, C. J.*, delivering the opinion, and holding that the terms of the former statute applied to males only. With regard to the operation of the statute relating to the construction of words importing the masculine gender, the court said: "The argument for the motion is simply this, that the application of this permissive rule of construction to a provision applicable in terms to males only has effect, without other sign of legislative intent to admit females to the bar, from which the common law has excluded them ever since courts have administered the common law. This is sufficiently startling, but the argument cannot stop there. Its logic goes far beyond the bar. The same peremptory rule of construction would reach all, or nearly all, the functions of the state government, would obliterate almost all distinctions of sex in our statutory *corpus juris*, and make females eligible to almost all offices under our statutes, municipal and state, executive, legislative and judicial, except so far as the Constitution may interpose a virile qualification. * * * There is no sign nor symptom in our statute law of any legislative imagination of such a radical change in the economy of the state government. There are many the other way; an irresistible presumption that the legislature never contemplated such confusion of functions between the sexes. The application of

the permissive rule of construction here would not be in aid of the legislative intention but in open defiance of it. We cannot stultify the court by holding that the legislature intended to bring about *per ambages* a sweeping revolution of social order by adopting a very innocent rule of statutory construction." In the course of this opinion the court intimate that since the Constitution vested in the courts the judicial power of the state, the privilege of admission to the bar was one exclusively within the discretion of the courts independent of and superior to legislative control, and this intimation was renewed in the matter of the subsequent application of Miss Goodell (48 Wis. 693) in which, however, the court, "in deference to the wishes of a co-ordinate branch of the government," admitted the applicant under a statute passed after their former decision, and providing that no person should be denied admission to the bar on account of sex.

In *Lelia J. Robinson's Case*, 131 Mass. 376 (1881), the application was made under a statute containing the following provision: "A citizen of this state or an alien who has made the primary declaration of his intention to become a citizen of the United States, and who is an inhabitant of this state, of the age of twenty-one years, and of good moral character, may, on the recommendation of an attorney, petition the Supreme Judicial or Supreme Court to be examined for admission as an attorney, whereupon the court shall assign a time and place for the examination, and if satisfied with his acquirements and qualifications he shall be admitted." Another statute laid down certain rules for the construction of statutes which were to be observed, "unless such construction would be inconsistent

with the manifest intent of the legislature or repugnant to the context of the same statute, and among these rules was one that "words importing the masculine gender may be applied to females." The court (GRAY, C. J., delivering the opinion), after an exhaustive review of the question, denied the application, saying: "The intention of the legislature in enacting a particular statute is not to be ascertained by interpreting the statute by itself alone and according to the mere literal meaning of its words. Every statute must be construed in connection with the whole system of which it forms a part, and in the light of the common law and of previous statutes on the same subject. And the legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors or to introduce a fundamental change in long-established principles of law."

Whatever may be the current of judicial opinion, there can be no question but that the tendency of modern legislation is strongly in favor of allowing women the privilege of admission to the bar. It is worthy of note that each one of the decisions above referred to was followed by a statute granting to women the privilege which the court had denied (see Rev. Stat. Illinois, chap. 13, sect. 1; Act of Congress Feb. 15th 1879, 20th stat. 292; Rev. Stat. Wisconsin, sect. 2586; Massachusetts Statutes of 1882, c. 139), and it seems probable that women will soon be admitted to the bar throughout the entire country. Whether any considerable number will avail themselves of the privilege, and if they do, what will be the effect upon the administration of justice, are questions which can only be determined by future experience.

F. P. P.

Supreme Court of Illinois.

ADAM SMITH v. THE PEOPLE.

Possession of property recently stolen is *prima facie* evidence of guilt, and is sufficient to warrant a conviction for its larceny, unless the attending circumstances or other evidence so far overcome the presumption thus raised as to create a reasonable doubt of the guilt of the accused.

On the trial of one for larceny of goods, the possession of which by the accused four days after the theft was not disputed, the court instructed the jury "that the possession of stolen property soon after the commission of the theft is *prima facie* evidence that the person in whose possession it is found is guilty of the wrongful taking, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt." *Held*, that the instruction was proper, and not open to the objection that it assumed the existence of any fact necessary to be proven which was disputed on the trial.

WRIT of error to the Criminal Court of Cook county.

Forrest & May, for plaintiff in error.

Luther Laflin Mills and Geo. C. Ingham, contra.

The opinion of the court was delivered by

SCOTT, J.—Accused was indicted for larceny of a wagon, and on a trial had in the Criminal Court of Cook county, was found guilty, and sentenced to a term of imprisonment in the penitentiary. Evidence was introduced tending to establish facts that show his guilt, and it is not claimed that on the testimony found in the record a new trial should be awarded had there been no error in the instructions given on behalf of the prosecution calculated to mislead the jury. The guilt or innocence of the accused is always a question for the jury, and their finding will seldom be disturbed, unless where it is manifest they have been misled by the instructions of the court to the prejudice of defendant.

The instruction given on behalf of the People, the correctness of which is called in question both in the argument and on the assignment of error, is as follows :

"The court instructs the jury that the possession of stolen property soon after the commission of the theft is *prima facie* evidence that the person in whose possession it is found is guilty of the wrongful taking, and is sufficient to warrant a conviction, unless

the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt."

There is no doubt there are contradictory decisions on this branch of the law, but in this state it is certainly settled that possession of property recently stolen is *prima facie* evidence of guilt, and is sufficient to warrant a conviction unless the attending circumstances or other evidence so far overcome the presumption thus raised as to create a reasonable doubt of the guilt of the accused, when, of course, an acquittal should follow. This principle is so definitely determined by the decision of this court in *Comfort v. The People*, 54 Ill. 404, it need not now be discussed as a new question.

The instruction as given states the law nearly in the precise terms it is declared by this court to be. Nor is it subject to the objection that it assumes any fact to be proved that was a matter of contention at the trial. It can not be said it assumes the existence of any fact, unless it was the possession of the property recently after it was stolen. That fact was proven by the People, and the accused admitted it came to his possession within four days after it was proven to have been stolen from the owner. Even if the instruction assumes the property was found in the possession of defendant shortly after it was stolen, that fact was not in dispute, and it certainly did the accused no harm. It was fairly left to the jury to find whether the other evidence and circumstances proven either by defendant or the People, sufficiently overcame the presumption of guilt raised by proof of possession of the stolen property shortly after the theft had been committed.

The facts the evidence tends to establish show the guilt of the accused past all reasonable doubt, and as the law applicable to the facts was fairly given to the jury, there is no ground for setting aside the verdict. The judgment will be affirmed.

Judgment affirmed.

The decisions in the various States upon the question as to what is the effect in a trial for larceny, of proving the possession of the stolen property by the accused, are certainly numerous, and in some of the States the difference in the language used by the various courts is very great, but it will generally be found that the authorities differ very little in principle.

The mooted points seem to be First,

whether the mere fact of finding the stolen property in the possession of the accused is sufficient of itself to warrant a conviction, or in other words what is the strength of the presumption raised by such a finding. Second, whether the presumption raised is one of law to be decided by the court or one of fact to be decided by the jury; and Third, whether, when it is shown that the

accused had recent and exclusive possession of the stolen property, the burden of proof is not shifted and thrown upon the defendant, making it necessary for him to prove how he came by the property or to be considered guilty of the offence.

As to the first question, it is generally admitted that the mere proof of the possession of the article stolen, without any evidence as to whether that possession was either recent or exclusive, is not of itself sufficient to raise a presumption of guilt strong enough to call upon the prisoner for a defence. The necessary circumstances which obviously must surround the possession must also be shown; the questions—how recent was the possession—was it exclusive—what was the nature of the articles—were they such as passed rapidly from hand to hand—or were they so marked that they could not have been transferred without raising suspicion—must be answered before any rule upon the subject of the strength of the presumption can be stated. It is but natural to suppose that when the rule “that the possession of stolen property is *prima facie* evidence of guilt,” is laid down either by text writers or by the courts, without other qualifications, the attending facts must also have been taken into consideration.

The best general rule upon the subject seems to be that proof of the possession of stolen property is one of the circumstances which go to show the guilt of the person accused and is to be looked upon in the same light as any other fact in the case. It may be a circumstance which when coupled with the surrounding facts, will be strong enough to raise a presumption of guilt, and, if uncontradicted, will justify the conviction of the person on trial; on the other hand it may not raise, even when the surrounding circumstances are proved, a presumption strong enough to hold the prisoner, unless it is supported by other facts, such as the denial of the possession by the ac-

cused, or some circumstance not connected merely with the possession itself. The presumption raised depends for its strength entirely upon the attending circumstances, or the answers to the questions which I have before enumerated. No fixed rule can be laid down to cover all the cases that may arise; it is a presumption not capable of being governed by general rules, each case differing from another in the facts that make the foundation for the rule that is to govern them.

The two extremes of the law which have been held are—on the one hand, that the possession is not evidence, to convict of the crime: *People v. Gassaway*, 23 Cal. 51; *The People v. Chambers*, 18 Id. 383;—on the other hand that it is sufficient to convict if not contradicted (*State v. Weston*, 9 Conn. 537). These rulings have been criticised (*Knickerbocker v. People*, 43 N. Y. 177), and it has been asserted that Greenleaf is responsible at least for the former decisions by reason of the law which he lays down in the third book of his commentaries.

As general rules they are undoubtedly bad, but when they are applied to cases where the facts authorize them, they may be both equally sound. The first may be sound when there is nothing but the bare possession, proved, without anything else; and this is what is meant by Greenleaf, when he lays down the rule in the 3d volume of his work, § 31; or it may be correct in the well-known case of a stolen negotiable note, where possession even a short time after the theft would not carry with it a presumption of guilt. The soundness of the second rule, when applied to an individual case, cannot be better illustrated than by quoting an unreported case in Pennsylvania.

The prisoner was charged with the larceny of a rope; the evidence produced proved that the rope was hanging in front of a store; that the prisoner was seen just before he got to the pavement in

front of which the rope was hanging, and was arrested on the pavement below, walking away with the rope in his hands. No one saw him take the rope; it was merely a case of the proof of the possession of stolen property by the accused, but no one would dispute the rule that possession in this case would carry with it such a presumption of guilt as would convict the prisoner of the offence.

The general weight of the authorities therefore seem to bear out the rule that the proof of the possession of stolen property carries with it a presumption of guilt strong or weak, in proportion to the recentness of the theft, the exclusiveness of the possession and the nature of the articles stolen, and this presumption is to be looked upon as any other fact tending to show the prisoner's guilt of the crime for which he stands indicted: *Commonwealth v. Montgomery*, 11 Met. 534; *Commonwealth v. McGorty*, 114 Mass. 293; *Engleman v. State*, 2 Ind. 91, 97; 2 Starkie's Ev. 615; Wharton's Crim. Ev., § 758, and cases cited; 1 Greenl. on Ev., § 34; 9 Cox Criminal Law Cases 465, &c.

In regard to the second question, as to whether the presumption is one of law or fact there seems to be little dispute. There have been cases in some of the courts in which it has been held that it is the duty of the court to instruct the jury as to whether the presumption has been raised or not, and as to its effect and degree of strength: *Pennsylvania v. Stephen Myers*, Addison's Reports 321; *State v. Brown*, 75 Missouri 317; references in Whart. Crim. Ev., § 758, and Best's Ev., § 322, but these decisions have almost all been overruled. (See *State v. Hodge*, 50 N. H. 510, and cases cited; *The State v. Hodge*, 53 Ind. 340; also see Wharton, Greenleaf and Best's Evidence before quoted.) All the authorities both in this country and in England agree in holding the presumption is purely one of fact; that it is the province of the jury to determine by

weighing the attending circumstances, whether there has been a *prima facie* case made out, or whether the presumption raised is strong enough to overcome the rebutting testimony and prove beyond all reasonable doubt the guilt of the accused. The presumption is not one to which the arbitrary rules applicable to presumptions of law can be applied; the whole question of the presumption in each case depending solely upon the facts as found by the jury in each particular instance: *Commonwealth v. Montgomery*, 11 Met. (Mass.) 534, &c.; *The State v. Richart*, 57 Iowa 245, and authorities quoted above.

Upon the last point—as to whether the proof of recent and exclusive possession of stolen property does not throw upon the prisoner the burden of proof—there is certainly some difference of opinion. Some writers have laid down the rule most explicitly, that upon such proof, unless the defendant shows how he came by the goods, or proves his innocence, the burden of proof being on him, there should be a verdict of guilty: Best on Presumptions, 47 Law Lib. (N. S.) 804; *Knickerbocker v. People*, 43 N. Y. 177. Others have said that it is not possible that the burden of proof should change no matter how strong the evidence of the prosecution may be, that it is a fundamental principle of the law that the proof offered by the prosecution must of itself be strong enough to convict the defendant before he is called upon to make his defence and that the case cannot be made out by reason of anything that the defendant may or may not do, that the burden of proof is always upon the prosecution and that it is erroneous to say that upon proof of a certain fact that burden is shifted to the defendant: *Stover v. People*, 56 N. Y. 315, &c.

It is true that the proof of a recent and exclusive possession, if not rebutted by any evidence produced by the prisoner, may be enough to convict him, but it does not seem proper to say that the

burden of proof, for this reason, as a matter of law, is always, upon such proof, changed. It may well be said that the non-contradiction of the evidence of possession or the want of an explanation of how the accused became possessed of the property, tends to decrease the probabilities of his innocence and that in proportion to increase or strengthen the evidence of his guilt, but unless the prosecution by the evidence it has produced has shown beyond reasonable doubt that the prisoner is guilty, the burden of proof is not thrown upon him to prove that he is innocent. This is probably what is meant by the writers

who assert in the technical language of the criminal courts, that the burden of proof is changed upon proof of exclusive and recent possession of the stolen property. The rule that "*Ei incumbit probatio qui dicit, non qui negat*" is too well established to be the subject of controversy.

It may therefore be said, in conclusion, that unless the recent exclusive possession proved is, under the circumstances, enough to show the prisoner guilty beyond all reasonable doubt the burden of proof is not thrown upon him.

CHARLES BIDDLE.

Philadelphia.

Supreme Court of Tennessee.

WHITMORE v. BALL.

On a motion for a new trial affidavits of jurors are admissible, even in a civil case, to show the misconduct of the jury after retiring, so as to vitiate the verdict.

If the jurors decline on the application of a party to give an affidavit of the facts, the trial-judge should, on motion of such party, call the jurors before him by process and examine them in open court touching the alleged misconduct.

If he has refused so to do, the Supreme Court will, where the affidavit of the applicant party showed an admission of misconduct by jurors, and the same was not denied by the opposite party nor contradicted by the jurors, award a new trial.

THIS was an action for libel in which, after verdict, the defendant moved for a new trial and read his own affidavit stating his grounds as follows: That A. M. Stoddard, one of the jury, after the jury had retired for consultation, stated to it that to his knowledge W. S. Trask, who wrote the article in the "Ledger," about which this controversy is, had prejudice and malice against the plaintiff, because when plaintiff had charge of the European Hotel, he had refused to give Trask free dinners or free meals, or free board at his house; that the "Public Ledger," which published the article complained of, and of which Whitmore is the owner, had published other articles defamatory of individuals, and that he wanted to stop it; that said Whitmore had published unjust and false articles about a society of which he (the juror) was a member, and that he had not forgotten it, and that he wanted to punish Whitmore for

these things. He further said that the witnesses who had given damaging testimony as to the character of the plaintiff and of the hotel he kept, he did not believe; that he had lived at the hotel and knew better, &c.

The affidavit further stated that such statements made in the jury room were calculated to mislead and prejudice the jury, and affiant believed did have an important effect and influence on the jury in inducing it to yield to Stoddard's suggestions and give a verdict for damages; that without them, he believed the verdict would have been for him, or at least for merely nominal damages.

The affidavit disclosed the names of three jurors, from whom the facts of Stoddard's conduct had been learned, but who refused to voluntarily give their affidavits, but said they would make the statements if called by the court or as the court might order. The court below refused to permit counsel to examine the said jurors in open court, as requested, holding it improper to do so in the absence of affidavits from the jurors themselves, and informed defendant's counsel that the court would wait for an affidavit from a juror and would consider it if presented. The court was then requested to examine the jurors or any of them touching the evidence of Stoddard in the jury room. This was refused, the court holding it to be improper in the absence of affidavits of some of the jurors themselves.

Judgment being entered on the verdict defendant took this writ of error.

The opinion of the court was delivered by

TURNEY, J.—That a verdict may be attacked and set aside for the misconduct of a juror, established by the testimony of his fellows, is too well established in this state to be disturbed now.

We know of no reason in public policy why it should be otherwise. It certainly has a controlling tendency to insure purity and fairness in jury trials. The statements of Stoddard as discovered in the affidavit were calculated to, and no doubt did, prejudice the jury and incline its minds to a verdict against the plaintiff in error.

Treating the affidavit as *prima facie* true, it is certain that Stoddard was the friend and advocate of the defendant in error, and that a fair and impartial trial could not be had at his hands.

A strong presumption arises, that his conduct in the jury room brought about the verdict.

This court has several times said, the better practice is, to examine the juror in open court. Such course gives the adverse side full opportunity to test the witness and place before the court the facts in their true light. No room is left for sliding over or concealing facts, which, if left out of an affidavit, put on the matter a face wholly different from the truth. In this case the accusing jurors had refused to make written affidavits, and we know of no rule by which court or counsel could have compelled them to it.

It was in the power of the court to have compelled them to answer questions.

In this case it appears that the affidavit had been filed long enough to give the plaintiff and counsel ample time to examine it and prepare to defend against it before the action of the court was invoked on inquiring into the conduct of the offending juror. This fact excites a decidedly strong suspicion that the facts charged could not be rebutted and we will look to it as a circumstance in the nature of a confession on the part of the plaintiff below of the truth of the charges. Under all the circumstances we are of opinion the court should have examined the jurors offered, or a sufficient number of them, some of whom were present under subpoena, to have shown the truth or falsehood of the facts charged and their influence upon the jury in arriving at its verdict. It was in the legitimate power of the court to have compelled the attendance and deposition of each juror while counsel and parties were powerless to compel written affidavits.

Reversed.

COOPER, J., dissented.

The doctrine and practice of courts in Tennessee in regard to the admissibility of evidence by jurors to vitiate their own verdicts is peculiar. In accord with the English and Federal cases it is held here, as in the other states, that, on a motion for a new trial, the court will not hear the affidavits of jurors to impeach their verdicts, because they had misunderstood or disregarded the charge of the court, or had misconceived or mistaken the evidence in the case: *Norris v. State*, 3 Hun 333; *Saunders v. Fuller*, 4 Id. 516; *Wade v. Orchoy*, 1

Baxter 229; *Dunnaway v. Sharon*, 3 Id. 206; *Richardson v. McLemore*, 5 Id. 586; *Roller v. Bachman*, 5 Lea 153; the same rule prevailing uniformly in civil and criminal trials. But, contrary to the present practice in England, and in the other states, save Ohio perhaps, the affidavit of jurors will be received to show their misconduct, such as receiving evidence *ex parte*, or holding private consultation with either party to the suit after retiring, or resorting to chance to reach a verdict. This course pursues the ancient practice prevailing in England

down to the time of Lord MANSFIELD, who changed the practice there in 1770.

As late as 1851 there seems to have been no established rule as to the admission or rejection of such affidavits in the federal courts. TANEY, C. J., then said: "It would, perhaps, be hardly safe to lay down any general rule on this subject. Unquestionably such evidence ought to be received with great caution:" *United States v. Reid*, 12 How. 361; since which no ruling seems to have been made in the Supreme Court upon the practice. In *Ladd v. Wilson*, 12 Cranch Cir. Ct. 305, and *Cline v. Bioy*, 1 Or. 90, the affidavits were refused, however.

In Ohio jurors' affidavits have been held admissible to a limited extent in exceptional cases, "where life or even liberty is threatened by misconduct of the jury:" *Farrer v. State*, 2 Warden's Ohio Rep. 54.

The practice of admitting them in Tennessee first received sanction in a capital case (*Crawford v. State*, 2 Yer. 60), in which it is probable the bias of the court was not a little *in favorem vitæ*, though the case received elaborate investigation, and was evidently well considered. Indeed, in the next case (*Booby v. State*, 4 Hun 111), the court say the case of *Crawford* was examined with much care, and as evidence of the wisdom of their decision, take manifest pleasure in saying that on the second trial *Crawford* was acquitted: *Id.* 116. In *Booby's Case* the new trial, though refused on the ground that a juror had bet on the verdict, was granted on the ground that a juror's affidavit disclosed that the verdict had resulted from statements made by a juror to the prejudice of the prisoner after the jury had retired; and the court places much stress upon the idea that this misconduct was in palpable violation of the constitutional provision, "that in all criminal prosecutions the accused hath a right * * * to meet the witnesses face to face." *Crawford's*

Case was decided in 1821 and *Booby's* in 1833; and, thenceforward, so far as the reports show, though the practice of admitting juror's affidavits was uniform, it was allowed only in criminal cases, till 1872, when the court, in *Wade v. Orchoway*, 1 Baxter 229, on elaborate consideration, extended it to civil cases; and ever since the affidavits of jurors have been held admissible to impeach their own verdicts, though, as the courts say, "they are to be received with great caution," because they tend to defeat solemn public acts, open a door to tamper with jurors after verdict, and permit a dissatisfied juror to destroy a verdict after he had once under oath assented to it. And in *Fish v. Cantrell*, 2 Heisk. 578, NICHOLSON, C. J., remarks: "It is time that circuit judges had ceased to allow the affidavits of jurors, as to the grounds of their verdicts, to be read on motions for new trials, *unless in extraordinary cases.*"

In *Mann v. State*, 3 Head 374, it is said that, "the circuit judges should cause the impeaching witnesses to be thoroughly examined in open court, instead of acting upon their prepared affidavits, though sworn to in open court. This would be the best and safest practice to avoid imposition." This remark was made in regard to an attempted impeachment of jurors *propter affectum*, but seems equally applicable to a case where the impeachment is for misconduct during trial. The singularity of the principal case consists in the fact that the verdict was set aside *without the affidavit or testimony of the jurors*, upon the *ex parte* affidavit of the plaintiff to a hearsay statement of what occurred in the jury room, which could probably have been proven only by the jurors. Defendant failed to produce and the court declined to call the jurors to contradict the hearsay charge of misconduct, and thereupon the affidavit was taken for confessed and the new trial awarded.

In *Drummond v. Leslie*, 5 Blatchf. 453, a new trial was refused which was sought on the affidavit of *third persons* as to what jurors had said impeaching their verdict. And in *Heath v. Conway*, 1 Bibb 398, a motion for process to bring in jurors, to testify of misconduct alleged against the jury, was denied, Judge Bibb remarking: "The court should be very cautious in collecting a jury after they are dismissed from their oaths, with intent to set aside their verdict, for 'no one knows whom they meet on the way.'" The power to recall them seems to be admitted, but on account of public policy it was refused.

Similar rulings were made in *Holingsworth v. Duane*, Wall. Cir. Ct. 147, and *Holmead v. Corcoran*, 2 Cranch Cir. Ct. 119. But in *Howard v. Cobb*, 3 Day 309, the court declared that neither a juror nor the officer of the jury could be compelled to testify as to alleged misconduct of the jury in separating without leave of court before returning a verdict.

The only previous Tennessee case on this subject leaves this question open. In *Stone v. State*, 4 Hun 27, the prisoner had exhibited affidavits of third parties as to misconduct of the jury, and moved for compulsory process to bring in the jurors to testify in regard to it. On argument the motion was overruled; but the court heard statements made by the jurors voluntarily. This action of the circuit judge was neither criticised nor affirmed; but it was observed by TURLEY, J., that "if hearsay evidence of misconduct in jurors might be received to set aside a verdict, verdicts would, indeed, be worth but little;" and "a new trial never has been, and it may safely be predicted never will be, granted upon the reported observa-

tions of jurors as to their conduct during the trial." That was in 1843.

The decision that "it was in the legitimate power of the court to compel the attendance and deposition of each juror" seems peculiar and in conflict with the current of decision in other states, but is probably the natural and necessary result of the peculiar state of the law in Tennessee as to the admissibility of jurors' affidavits or testimony in impeachment of their own verdicts.

In other states, applications to compel jurors to give evidence to impeach their verdicts have been denied, because such evidence is not admissible. Yet if the fact of misconduct by the jury is satisfactorily shown by competent evidence, a new trial results. In this state the evidence of the juror is admissible to show the misconduct; and therefore the courts will aid the complaining party by process, if necessary, to procure this competent evidence as well as any other that will assist in the administration of justice.

The Code of Tennessee provides, sect. 3167, that "if the judgment or decree of the inferior court be reversed, the appellate court shall give such judgment or make such decree as should have been rendered in the inferior court;" and, sect. 3170, that "the court shall also, in all cases where, in its opinion, complete justice cannot be had by reason of some defect in the record * * * remand the cause to the court below for further proceedings, with proper directions to effectuate the objects of the order, and upon such terms as may be deemed right." Why was this case not remanded with directions to the circuit judge to hear the evidence of the jurors, before acting on the motion for a new trial?

H. H. INGERSOLL.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF ARKANSAS.²SUPREME COURT OF IOWA.³COURT OF ERRORS AND APPEALS OF MARYLAND.⁴SUPREME COURT OF TENNESSEE.⁵

ACTION

Insurance—Party to whom Loss Payable—Right to Sue in own Name.

—An insurance policy issued to Coates & Bro. contained the clause, "loss, if any, payable to the Savings Bank of Baltimore, mortgagee." Held, that C. & Bro., with the express written consent of the Savings Bank of Baltimore, could, in case of loss, bring an action on the policy, in their own names: *Coates v. The Pennsylvania Fire Ins. Co.*, 58 Md.

ADMIRALTY.

Jurisdiction—Tort—Injury to Consignee boarding Vessel at Wharf—Negligent Stowage.—The jurisdiction of courts of admiralty extends to a suit against the owners of a vessel by one who, expecting a consignment of goods by the vessel, and in accordance with a general custom, went aboard of her upon her arrival at the wharf, and, while proceeding to the office, was injured by the fall of bales negligently stowed: *Leathers v. Blessing*, S. C. U. S., Oct. Term 1881.

Act of Feb. 16th 1875—Constitutionality of—Limitation of Appeal to Question of Law—Refusal to find certain Facts—Bill of Exceptions.—The Act of Congress of Feb. 16th 1875, confining the appellate jurisdiction of the Supreme Court in admiralty to questions of law arising on the record, is constitutional: *Duncan v. Steamship Francis Wright*, S. C. U. S., Oct. Term 1881.

If the court below refuses to make a finding as to a material fact, or finds a fact which is not supported by any evidence whatever, the ruling may be brought up for review by bill of exceptions, but this rule does not apply to mere incidental facts which only amount to evidence bearing upon the ultimate facts of the case: *Id.*

Where the ground of the appeal is the refusal to find a certain fact, it should appear that appellants called the attention of the court to the fact as a material one in the cause and to the testimony which conclusively proved it, and such testimony should be contained in the bill of exceptions. And so if the exception is as to facts that are found, it should be stated that it was because there was no evidence to sustain

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 15 Otto.

² From B. D. Turner, Esq., Reporter; to appear in 38 Arkansas Reports.

³ From Hon. John S. Runnells, Reporter; to appear in 57 Iowa Reports.

⁴ From J. Shaaff Stockett, Esq., Reporter; to appear in 58 Maryland Reports.

⁵ From Hon. Benjamin J. Lea, Reporter. The cases will probably appear in 8 or 9 Lea.

them, and then so much of the testimony as is necessary to establish this ground of complaint should be incorporated in the bill of exceptions : *Id.*

AGENT. See *Bills and Notes*.

BANKRUPTCY. See *Debtor and Creditor*.

BILL OF EXCEPTIONS. See *Admiralty*.

Statement of Charge.—The bill of exceptions should not set forth the charge of the court in full. Only such parts should be given as will point the exceptions ; all else is unnecessary and produces only inconvenience. The judges of the court below should withhold their signatures to the bill until it is freed from all matter not essential to explain and point the exceptions : *United States v. Rindskopf*, S. C. U. S., Oct. Term 1881.

BILLS AND NOTES.

Signing—Fraud—Negligence—Agent.—What constitutes reasonable care and diligence in the execution of an instrument is ordinarily a question of fact for the jury. Where a party trusts to the agent of the payee to read a note correctly, without calling upon a member of his family to read it for him before signing, it is not, as a matter of law, negligence : *Hopkins v. Hawkeye Ins. Co.*, 57 Iowa.

The fraudulent acts of an agent, committed in the direct line of his employment, will render the principal liable : *Id.*

It is competent to show by parol, that because of the fraud of a party to an instrument, it does not express the real agreement : *Id.*

Want of Consideration—Evidence.—As between the immediate parties to a negotiable promissory note, while the note itself is *prima facie* evidence of the consideration, the question of consideration is always open ; and it is competent to the defendant to show, by parol, that there was no sufficient consideration, or that the consideration had failed, or that the paper had been given for accommodation merely : *Ingersoll v. Martin*, 58 Md. !

CHARITY.

Uncertain designation of Beneficiaries—Next of Kin.—The residuary clause of a will, provided as follows : " Whatever balance, if any, shall remain after payment of my debts and all necessary expenses, I direct my executor to divide proportionally between benevolent associations of this city, for the benefit of white and colored children." On a bill filed by the executor to obtain a judicial construction of said clause, it was held : 1st. That said clause was void ; first, because the benevolent associations to which the testator referred, were not named or designated in the will ; and second, because the beneficiaries for whose use the gift was intended, were undefined and uncertain. 2d. That the next of kin of the testator were entitled to the fund : *The Henry Watson Children's Aid Society v. Johnston*, 58 Md.

COMMON CARRIER.

Railroad—Liability for Baggage—Check to Point beyond its own Line.—A carrier contracting, without any limitation of responsibility, to

carry the baggage of a passenger, and giving a check therefor, to a given point beyond the terminus of the carrier's line, becomes liable for the carriage of such baggage to the point to which it is checked, notwithstanding that its owner may purchase and travel upon a coupon ticket: *Louisville and Nashville Railroad Co. v. Weaver*, 8 or 9 Lea.

Plaintiff bought tickets from the defendant railroad for transportation for herself and family from Memphis to San Francisco, each ticket having separate coupons for each carrier over whose road the route lay. Defendant gave plaintiff a check for the carriage of her baggage to Omaha, a point beyond its own line. The baggage was lost before reaching Omaha, but after leaving defendant's line. *Held*, that defendant was liable for the loss: *Id.*

CONSTITUTIONAL LAW. See *Admiralty*.

CONTRACT.

Consideration—Release—Subsequent Promise.—If a debtor by paying part of his admitted debt, obtains from his creditor an agreement to release the residue, such an agreement is *nudum pactum*, and therefore inoperative. But a release under seal imports consideration, and such a release is a sufficient discharge without anything more: *Ingersoll v. Martin*, 58 Md.

A promise to pay a debt, after it has been voluntarily released by the creditor, is not supported by a sufficient legal consideration to make it binding: *Id.*

Charge for use of Railroad—Use of Road while refusing to pay Price—Quantum Valebant.—A., who was the proprietor of a railroad, informed B., who had been previously using it, that for all cars subsequently shipped over it, he would charge \$2 each; B. immediately replied that he would not pay that amount, and continued to use the road. Upon bill filed by A., seeking to collect from B. \$2 for each car, it was *held*, that he could only recover the reasonable value of the use of the road: *Curtis v. Giers*, 8 or 9 Lea.

CORPORATION.

Assets a Trust Fund for Creditors—Purchase by Director.—The assets of an incorporated company are a trust fund for the payment of its debts, and may be followed into the hands of any person acquiring them with notice of the trust. A director of the company is conclusively presumed to know its pecuniary condition, and his purchase of the assets will not be *bona fide*, and without notice of the trust: *Jones v. Ark. Mech. and Agl. Co.*, 38 Ark.

The purchase of the assets of an incorporated company by a director of the company, is not void, but only voidable at the instance of a party in interest: *Id.*

COST. See *Trustee*.

DAMAGES. See *Equity*.

DEBTOR AND CREDITOR. See *Partnership*.

Fraudulent Conveyances, when impeachable by Subsequent Creditors.—A voluntary conveyance may be impeached by a subsequent creditor

on the ground that it was made in fraud of existing creditors ; but to do so, he must show either that actual fraud was intended, or that there were debts still unpaid which the grantor owed at the time of making it: *Toney v. McGehee*, 38 Ark.

Fraud will not be inferred from an act which does not necessarily import it. It is never presumed, and circumstances of mere suspicion, leading to no certain results, are not sufficient proof of it: *Id.*

Fraudulent Conveyance—Intent to avoid Claim for Tort.—To render a conveyance invalid, as between a fraudulent grantor and his grantee, it is not necessary that the fraudulent intent, or knowledge, should be traced to the grantee: *Weir v. Day*, 57 Iowa.

A person having a claim for a tort is a creditor, and where the conveyance was made with the intent in part to evade fines and judgments which might be obtained for torts, it renders the conveyance wholly fraudulent: *Id.*

Mortgage to Creditor to Defraud other Creditors.—A mortgage executed by an insolvent mortgagor and covering his entire estate, to a creditor who knows of his insolvency and who for the purpose of giving him a fictitious credit, conceals the mortgage and withholds it from the record and represents the mortgagor as having a large estate and unlimited credit, by which means the latter is enabled to contract other debts which he cannot pay, is void at common law: *Blennerhasset v. Sherman*, S. C. U. S., Oct. Term 1881.

Such mortgage is void under the Bankrupt Act although executed more than two months before the filing of the petition: *Id.*

DECEDENTS' ESTATES.

Insolvent Estate—Liability of Land—Improvements by Heirs.—An executrix, who was authorized by the will to convey portions of the realty to the female heirs upon their marriage, conveyed a lot to N., whose husband, believing the estate solvent, erected valuable improvements thereon; the estate subsequently became insolvent. *Held*, that the husband, upon paying what would be the present value of the lot without the improvements, could hold the lot: *Gillespie v. Murphy*, 8 or 9 Lea.

DEED.

Consideration—Support of Parents—Failure of.—A conveyance made upon the consideration of support of parents will be set aside when the evidence shows an abandonment by all the parties, of the contract of support: *Jewell v. Reddington*, 57 Iowa.

DESCENT.

Illegitimate Children—Transmission of Inheritance—Change of Laws of Descent.—Children of the same mother, whether legitimate or illegitimate, may transmit an inheritance to any and all collateral relations on the mother's side who are of her blood: *Gregley v. Jackson*, 38 Ark.

Laws of inheritance rest in public policy; and during the life of the person owning the property, may be changed at will, without any violation of contractual or vested rights. No one has a vested right to be the future heir of one living: *Id.*

DURESS.

Deed by Married Woman—Evidence.—To set aside a deed made by a married woman, on the ground of duress or undue influence, where it appears from the proof that she was a lady of good intelligence and capacity, in full possession of her mental faculties, and the deed shows upon its face that she appeared with her husband before a justice of the peace, and solemnly acknowledged it to be her act, requires the clearest and most satisfactory evidence: *Linnenkemper v. Kempton*, 58 Md.

EQUITY. See *Husband and Wife*.

Injunction—Taking of Bond—Jurisdiction of Court over Question of Damages—United States Courts—Appeal.—Where in an equity cause an injunction has been granted and an injunction bond required, the court has, on the final disposition of the cause, power to make a decree granting or denying damages on account of such injunction: *Russell v. Farley*, S. C. U. S., Oct. Term 1881.

Such power is an inherent one not depending on any provision in the bond, nor on express law or rule of court, and it may be exercised by a circuit court of the United States into which the suit had been removed, although the state court from which it was removed could not, under the state statutes, have determined the question of damage: *Id.*

Semble. The court may also assess the amount of the damages without requiring an action of law upon the bond: *Id.*

The decision of the court on the question of damages approaches so near to an exercise of discretion that it would require a very clear case to induce the appellate court to reverse: *Id.*

Cause Cognisable at Law—Failure of Ground of Equitable Relief.—Where a cause of action cognisable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill and remit the cause to a court of law: *Mitchell v. Dowell*, S. C. U. S., Oct. Term 1881.

ERRORS AND APPEALS. See *Bill of Exceptions*.EVIDENCE. See *Bills and Notes*.

EXECUTION.

Levy—How Made.—To make a legal, valid levy upon personal property, the officer must do such acts as that, but for the protection of the writ, he would be liable in trespass. A levy under which the officer does not have actual control of the personal property levied upon, with power of removal, is invalid: *Rix v. Silknitter*, 57 Iowa.

EXECUTORS AND ADMINISTRATORS.

Power of Sale—Does not Include Power to Mortgage—Renewal of Decedents' Notes—Personal Liability of Executrix—Subrogation.—An executrix has no authority, unless it is expressly or impliedly conferred by the will, to mortgage real assets of the estate for money borrowed by her for the purpose of paying debts of the estate; and the

fact that she is authorized by the will to sell realty for reinvestment or distribution, will not impliedly empower her to borrow money and mortgage realty therefor: *Gillespie v. Murphy*, 8 or 9 Lea.

An executrix cannot borrow money and charge her estate for its repayment, and persons lending her money for use in payment of the debts of the estate, do not thereby become creditors of the estate but personal creditors of the executrix, who may limit her personal liability by agreeing to pay only out of the assets of her testator, but she cannot thereby charge her estate: *Id.*

An executrix renewing notes of her testator makes them her personal obligations, even though she expressly contracts as executrix: *Id.*

Persons lending money to an executrix, payees of notes renewed by an executrix, and mortgagees for sums loaned the executrix, cannot prove as creditors of the estate under an administration bill; but the executrix may prove as creditor to the extent that sums so borrowed by her have been used in satisfying valid charges against the estate, and such creditors may by cross-bill be substituted to her rights, and thus become general creditors of the estate: *Id.*

EXPRESS COMPANY.

Privilege Tax—Railroad doing Express Business.—A foreign railroad company having an office within a state, and which carries on as part of its business a regular "express business," is liable to pay a privilege tax which is by statute required to be paid by "all express companies doing business in the state:" *Memphis & Little Rock Railroad v. State*, 8 or 9 Lea.

FRAUD.

Misrepresentation—Expression of Opinion.—Whenever property of any kind depends for its value upon contingencies which may never occur or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character, and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance on it may produce: *Gordon v. Butler*, S. C. U. S., Oct. Term 1881.

Semble. For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating to the truth, and for a false statement of them where deception is designed and injury follows, an action may lie: *Id.*

HUSBAND AND WIFE.

Alimony—How Enforced—Jurisdiction of Chancery.—Courts of chancery have jurisdiction to order the husband to pay *ad interim* alimony to his wife to enable her to prosecute her suit for divorce, and to enforce it by all or any of the means by which courts usually compel obedience—whether by execution or other orders, or by proceedings as for contempt; and if he be the plaintiff, and his wife's answer a cross-

complaint, his complaint may be dismissed for disobedience to the order, and the cross-complaint prosecuted to final decree. An appeal from an order for *ad interim* alimony may be taken immediately : *Cus-teel v. Casteel*, 38 Ark.

Alimony should not be declared a lien upon the husband's lands. Its payment may be secured by sequestration or by exacting securities from him : *Id.*

INJUNCTION. See *Equity*.

INSURANCE. See *Action*.

JUDICIAL SALE.

Covenants of Warranty—Right of Purchaser to Benefit of.—A covenant of warranty runs with the land and enures to the benefit of a purchaser at a judicial sale. One who buys the land at a sale in a vendor's suit, to enforce his lien, may sue the vendor for a subsequent eviction, which constitutes a breach of vendor's warranty to his vendee : *Williams v. Berg*, 8 or 9 Lea.

LANDLORD AND TENANT.

Right to Crop as against Mortgagee.—When a tenant abandons his crop and fails to perform the terms of his lease, the landlord may gather, gin and bale the cotton cultivated by him, and take out of it and retain against the tenant's mortgagee of the crop the expenses of preserving it from waste and preparing it for market, as well as the rent : *Fry v Ford*, 38 Ark.

LIMITATIONS, STATUTE OF.

Fraudulent Conveyance—Right of Creditor—Joint Friendly Possession.—The Statute of Limitations in favor of a fraudulent or voluntary grantee begins to run against the creditor of the grantor who seeks to enforce his debt against the property conveyed, from the time when such creditor has a right of action to test the validity of such conveyance : *Ramsey v. Quillen*, 8 or 9 Lea.

Adverse possession for the statutory period after the creditor's claim matured, first by a son to whom the debtor had conveyed, then by the wife of the debtor to whom the son conveyed, and then by another son to whom the wife had conveyed, is sufficient to bar the creditor's right : *Id.*

In cases of joint friendly occupation of land the benefit of such possession enures to him who has the legal title : *Id.*

Occupation by husband and wife, where the legal title has been conveyed to the wife and registered, and possession is held openly under such deed, enures to the benefit of the wife. She cannot be deprived of the benefit of the Statute of Limitations by such joint possession, nor is she required to live apart from her husband in order to hold her land : *Id.*

MASTER AND SERVANT.

Contract for Particular Time—When entire—Action for Part Performance.—When a contract for service is for a particular time, and payment is to be made, either expressly or by implication of law, at the end of the period, and the servant leaves the service of his master improperly,

without a sufficient cause, and without his consent, before the expiration of that time, he can recover no compensation for his services, either on the contract or on a *quantum meruit*: *Hibbard v. Kirby*, 38 Ark.

MORTGAGE. See *Landlord and Tenant*; *Surety*.

After acquired Title—Judgment Liens.—A mortgage of lands not owned by the mortgagor, will attach and become a lien thereon, there being no intervening equities, the moment the mortgagor acquires title to the land, and it cannot be divested by, or rendered subordinate to, the lien of subsequent judgments: *Rice v. Kelso*, 57 Iowa.

Holders of judgment liens, not made parties in the foreclosure of a superior mortgage, have their right of redemption, but cannot acquire titles under execution sales that will defeat the mortgage title: *Id.*

MUNICIPAL CORPORATION. See *Negligence*.

NEGLIGENCE. See *Railroad*.

Municipal Corporation—Diversion of Stream—Contributory Negligence.—In an action against a city to recover for an injury to a building, alleged to have been caused by the wrongful and negligent obstruction of the natural channel, and diversion of the course of a stream by the defendant, the failure of plaintiff to use ordinary diligence and effort to prevent damage, and to incur moderate expense, if thereby the injury might have been prevented, would constitute contributory negligence, and entirely bar recovery; and an instruction that in such case he would still be entitled to recover such sum as would have prevented the injury if it had been expended, was erroneous: *Hoehl v. City of Muscatine*, 57 Iowa.

Where a stream meanders through a city, and lots and streets have been platted without reference to it, nor bounded by it, the doctrine of riparian proprietorship is not applicable: *Id.*

Railroad—Burden of Proof.—An action in the name of the state was brought against a railroad company to recover damages for a death alleged to have been caused by the negligence of the defendant. The deceased was found under the cars of the defendant mortally wounded. There was no testimony showing in what manner he got under the cars. Whether he was attempting to get on them while in motion, or fell while attempting to cross the track, was not explained by the evidence. The cars were on a siding, and going at the rate of one mile an hour. *Held*, 1. That the jury were properly instructed that "under the pleadings and evidence in the cause the plaintiff was not entitled to recover." 2. That the burden was upon the plaintiff in the first instance to prove negligence or want of ordinary care on the part of defendant's agents causing the accident: *State, to use of Miller, v. The Baltimore and Ohio Railroad Co.*, 58 Md.

The place where the accident happened was not at a street, or highway, or a crossing-place. The defendant was entitled to a clear unobstructed track, and could not presume that any one would intrude thereon. There was no evidence that the deceased had any right to go upon the track. *Held*, that even assuming that there was some evidence that the cars had no brakeman on them while being run upon the sid-

ing, that fact would be no ground for charging the defendant with culpable negligence: *Id.*

PARTNERSHIP.

Voluntary Conveyance—Constructive Fraud—Subsequent Creditors.—Where a member of a partnership, which was largely indebted, made a voluntary conveyance of all his individual property, but without any purpose to defraud the firm creditors, such conveyance would be constructively fraudulent, and liable to be avoided: *Barhydt v. Perry*, 57 Iowa.

Where the conveyance was voluntary, and included all of the individual property of one member of a partnership, which was largely indebted at the time, subsequent creditors whose means have been used to pay off the prior indebtedness will be subrogated to the rights of the prior creditors, and they may avoid such conveyance: *Id.*

Unauthorized Suit by one Partner—Ratification by Silence—Ignorance of the Law.—Where a suit is brought in the name of a firm by one partner, without the knowledge or consent of his copartners, and the latter upon learning of it express their disapproval, but take no steps to have it dismissed, and wait until a decree entered by the lower court in their favor is reversed on error and a decree entered against them, they cannot escape responsibility or claim relief against the execution of the final decree: *Harris v. Mosby, Receiver*, 8 or 9 Lea.

In such case it makes no difference that their acquiescence was in ignorance of the law, and in consequence of the advice of counsel that they were legally bound by the institution of the suit: *Id.*

RAILROAD. See *Express Company*.

Negligence—Rate of Speed.—In an action against a railroad company for the killing of plaintiff's mules by a train, the court charged that if at the rate of speed the train was running it could not have been stopped within the distance at which the headlight upon the locomotive would discover obstructions upon the track, and the jury should be of the opinion from these facts that defendants were reckless in so running the train, the defendants were liable notwithstanding all the prescribed precautions were observed. *Held*, that this was error, as the fact that the train could not be stopped within the distance mentioned was not the true test of negligence, although it might be evidence to be considered with all the other circumstances: *Milam v. L. & N. Railroad Co.*, 8 or 9 Lea.

SALE.

Warranty—Patent Defects—Fraud.—Neither warranties nor false representations bind the maker, regarding things patent to any observer who would take the trouble to examine the article, where the aggrieved party has the opportunity of seeing it. But where one of the parties declines the examination on the grounds of his want of experience and judgment, and expressly declares that he confides in the judgment of the other, this imposes upon the other, if he accepts the trust, the duty of fair representations, even as to matters which might easily have been seen by one well acquainted with the subject of the negotiation; but even then he is bound only for a fair exercise of his judgment, and is not liable for an honest mistake: *Hanger v. Evins*, 38 Ark.

If a vendor, experienced in the manufacture and use of an article, knows that the purchaser is without experience in such things, and that there are material defects in it, which are not apparent to ordinary observation, and he deceitfully induces the purchaser not to inquire into its condition, he is guilty of a fraud, for which the purchaser may recover: *Id.*

If a vendor knows the purposes for which an article is intended by the purchaser, and so represents to him, and also knowingly and fraudulently represents that he knows the purchaser's business, and that the article is well fitted for it, and the purchaser rely on such representations in making the purchase, and they are untrue, it is a fraud, for which he may recover: *Id.*

Warranty—Particular Purpose.—Where a known, described and defined article is ordered, even of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described and defined thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer. In such case the buyer takes upon himself the risk of its effecting its purpose: *Rasin v. Conley*, 58 Md.

This doctrine applies to sales of fertilizers by those who manufacture them: *Id.*

SPECIFIC PERFORMANCE.

Decree for Part only—Compensation for Residue—Measure of.—Where a vendor cannot convey all the lands he has contracted to, the vendee may have specific performance for the part he can convey, and as an incident to the suit, compensation for the residue; but courts of equity will not assume jurisdiction for the sole purpose of awarding damages for a breach of contract to convey, where the vendee knows at the institution of the suit that the vendor cannot convey: *Bonner v. Little*, 38 Ark.

Where a vendee of land by title-bond elects to take under the contract the part which the vendor can convey, and compensation for the residue, the price should be abated in the same proportion to the whole amount, as the value of the whole tract is diminished by the deficiency: *Id.*

SUBROGATION. See *Executors*; *Partnership*.

SURETY.

Joint Note—Verbal Release of one Maker—Mortgages—Application of Proceeds.—Where two persons gave their joint note for borrowed money, of which, by an agreement known to the lender, each was to have one-half, it was not a case of suretyship, but each was a principal for the whole amount; and a verbal agreement of the lender upon payment of one-half by one maker to look to the other for the balance due on the note, not shown to have been based upon a consideration, was not binding: *Small v. Older*, 57 Iowa.

Where the proceeds of mortgages executed to secure an individual note and a joint note were not sufficient to pay both, the holder of the notes was under no obligation to apply the sum realized upon both notes, *pro rata*, but might apply the entire sum upon the individual note: *Id.*

TAXATION. See *Express Company*.

TRIAL.

Dismissal of Action—When allowed.—A cause is not finally submitted to the jury until they are directed to enter upon the consideration of the case, and where a party offered to dismiss his case before the jury were instructed, but after the court had indicated what the instruction would be, the offer should have been allowed and the cause dismissed: *Mullen v. Peck*, 57 Iowa.

TRUST. See *Charity*.

Sale under a Power—Application of Purchase-money—Liability of Purchaser.—Where trustees under a will have power to sell, in their discretion, and re-invest the proceeds on the same trusts, a purchaser from them is not bound to see to the application of the purchase-money: *Van Bokkelen v. Tinges*, 58 Md.

TRUSTEE.

Right to Appeal—Liability for Costs.—A conventional trustee appointed to sell property and distribute the proceeds among creditors has the right to an appeal: 1st. Whenever his commissions, or other allowances as trustee are affected by the order of the court below; 2dly. In all cases where the trustee is interested in the fund to be distributed, as a creditor; 3dly. In any case where the question of the increase or diminution of the *whole* fund in his hands as trustee is involved, and which increase or diminution would enure to the benefit or loss of *all* the creditors: *Frey v. Shrewsbury Savings Institution*, 58 Md.

But where the question is a contest between the creditors of the debtor among themselves, the trustee has no right to intervene, and it is not his duty to prolong the litigation. In such cases the creditors whose rights are affected are the proper persons to appeal: *Id.*

Where, however, the court is satisfied the trustee in appealing acted in good faith, and in discharge of what he supposed to be his duty, the costs will be paid out of the fund: *Id.*

UNDUE INFLUENCE. See *Duress*.

UNITED STATES COURTS. See *Equity*.

VENDOR AND VENDEE. See *Fraud*.

WARRANTY. See *Judicial Sale*; *Sale*.

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RECEIVERS FOR COTENANTS.

THE appointment of receivers in partition suits and in other actions between cotenants is an exercise of jurisdiction which is of much importance in view of the landed and moneyed interests often involved. An investigation of the authorities reveals also that there are many elements and considerations of legal consequence developed by the cases in which this power of the courts is discussed.

The power to appoint receivers of the common property at the instance of one of the cotenants has been characterized as an extraordinary one, which the court should not exercise except in the clearest cases: *Low v. Holmes*, 14 N. J. Eq. 148. See also *Norway v. Rowe*, 19 Ves. 159; *Scurrah v. Scurrah*, 14 Jur. 847; *Spratt v. Ahearne*, 1 Jones Ir. Exc. 50. Hence we find it laid down that the court will not grant a receiver against a tenant in common in possession, at the suit of another tenant in common, unless in cases of destructive waste or gross exclusion: *Kerr on Receivers* 106. See also to same effect *Ex parte Billinghamst*, Amb. 164; *Ex parte Radcliffe*, 1 J. & W. 619. So in the case of *Verplank et als. v. Caines et ux.*, 1 Johns. Ch. 57, Chancellor KENT says: "The exercise of this power (to appoint a receiver) must depend upon sound discretion, and in a case in which it must appear fit and reasonable that some indifferent person, under approved security, should receive and distribute the issues and profits, for the greater safety of all parties concerned.

Despite these restrictions the power to appoint a receiver in a partition suit has been recognised and enforced in England from an early date. In *Evelyn v. Evelyn*, 2 Dickens Ch. Rep. 800, a receiver was appointed to an undivided estate.

So in *Street v. Anderton*, 4 Brown's Ch. Rep. 305, the lord chancellor ordered that the cotenant, who, according to the statement of counsel in *Archdeacon v. Bowes*, 3 Anst. 752, had taken more than his share of the profits, should give security to account for one-third of the rents, otherwise the order to go for a receiver. So also *Calvert v. Adams*, 2 Dick. 478. It has been remarked of the early English cases that there is no indication of the ground of the decisions: Freeman on Cotenancy and Partition, sect. 327. But in *Milbank v. Revett*, 2 Merivale 404, it was held that the court refuses to grant a receiver of estates, as between tenants in common, except in gross cases of exclusive possession. See also Brown's Ch. Rep. 35, note. Another instance is afforded by *Holmes v. Bell*, 2 Beav. 298, where a receiver was appointed at the instance of a party seeking to foreclose a mortgage against both cotenants, one of whom was in possession of the whole rents.

But there are more recent instances of such appointments. Thus in *Hargrave v. Hargrave*, 9 Beav. 549, a receiver was appointed to take possession of a moiety of an estate, claimed by plaintiff as tenant in common with the defendant who was in possession of the whole. The contest was between parties claiming to be heirs; the plaintiff being an infant whose legitimacy was disputed.

So in *Sandford v. Ballard*, 33 Beav. 401, a receiver of the whole property was granted at the hearing as between tenants in common, there being evidence that the defendant, one of them, had excluded the rest. The application had previously been denied, except as to plaintiff's moiety, for want of proof of such exclusion. See same case, 30 Beav. 109.

It will be noted that in several of the cases it was regarded as indispensable that there should be an exclusion of the cotenant: *Sandford v. Ballard*, *supra*; *Milbank v. Revett*, *supra*. Yet it has been laid down that even in such cases there is room for other remedies. Thus it is stated that it was doubtful whether a court of equity would appoint a receiver even in the case of an exclusion of one tenant in common by another. For if it were an exclusion which amounted to an ouster at law, the party complain-

ing was bound to assert at law his legal title. Again, if it were not such an exclusion, a court of equity would compel the tenant in common to account for the rent to his companion, but would not act against his legal right to possession, for the reason that the party complaining might at law relieve himself by the writ of partition: *Tyson v. Fairclough*, 2 Sim. & Stu. 143, per Sir JOHN LEACH, M. R. But it is said of these remarks that they do not seem to be borne out by the cases, if indeed they have not been misunderstood. See *Searle v. Smales*, 3 W. R. 437; Kerr on Receivers 115.

So the American case of *Low v. Holmes*, 17 N. J. Eq. 148, though not attempting to go as far as the case last cited, also holds that there is no ground for the appointment of a receiver, unless the complainant is by the act of his cotenant excluded from the enjoyment of his share of the property.

But in many of the American cases more liberal views of the functions of courts of equitable jurisdiction prevail. Thus in the case of *Rutherford, Receiver, &c., v. Jones*, 14 Ga. 521, which was a bill for partition, the court say: "But equity can do more than seems to be imagined by those who have instituted this proceeding. It can not only direct a sale of some of the lots and a partition of some of the others, in whole lots or in parcels, and decree compensation to equalize the allotments, *but it can appoint a receiver* to rent out this property, the whole or any part of it, and pay over the profits to the cotenants, according to their respective rights and interests. Yea, it may do more than this; it can order any one or more of these twenty-five lots to be held and enjoyed for a certain length of time by one of the cotenants, and then by the other, and so on successively."

This question of the equitable control over such appointments, recently underwent a thorough discussion in the case of *Goodale v. The Fifteenth District Court et al.*, decided by the Supreme Court of California, Sept. 22d 1880, and now reported in 56 Cal. 26. In the state in which the controversy arose, the Code of Civil Procedure provides for the appointment of receivers in certain specified instances pertaining to mortgages, partnerships, judgments, insolvent corporations, &c. Finally it is declared that receivers may be appointed in all other cases where receivers have heretofore been appointed by the usages of courts of equity. The contest as to the construction of this last provision arose in this wise: a suit of

partition was brought in the court below, and an interlocutory decree entered therein, and three referees were appointed to make partition of the lands in controversy. Subsequently an order was made appointing a receiver with power to take possession of the lands and lease them in parcels, to collect the rents, issues and profits of the lands pending the action, and therefrom to pay the taxes and such other expenses as the court might direct, as well as to exercise the powers and duties of receiver in like cases. This action of the court below was reviewed on certiorari. The principal opinion notes that from the manner in which the case came before the appellate court, the question involved was one of jurisdiction only, and that court was not called upon to inquire into the correctness of the order of the court below. Indeed in the argument of the petitioners (it was pointed out) this was admitted, and the following language used: "We do not ask the court to inquire into the sufficiency of the proofs upon which the court below founded its action, nor to inquire into any mistakes of law or fact which the court may have possibly fallen into in the course of its consideration of the case before it, but whether it had any right to consider it at all, whether it had any right in a case of this impression to reach that result at all." In other words, is it competent for a court *in any particular suit*, to appoint a receiver to take possession of the property, collect the rents, pay the taxes, lease the property, &c. It very clearly appears that a suit in partition is an equitable proceeding, because it is not competent for a court of law to carry into effect the various and complicated provisions of the statute on the subject.

After reviewing the authorities, the opinion proceeds: "The foregoing cases show that it is competent for a court of equity, in some cases, to grant a receiver in partition suits, and we can readily understand why such a power should be vested in the court. Take, for example, the case of a mine containing precious metals. It is in the possession of one tenant in common and is being worked by him to the exclusion of the other cotenants. He is insolvent and unable to respond in damages. Here we have a case in which the value of the property is being rapidly exhausted by an irresponsible cotenant, and the cotenants out of possession are threatened with an entire destruction of their estate. Would it not be eminently just and proper for the court in which a suit was pending for the partition of such property to wrest it from the possession of the

tenant holding and working it, and to put it into the hands of a receiver? Or suppose the estate consisted of land, the only value of which was in the timber upon it, and the tenant in possession was cutting down and disposing of such timber and appropriating the proceeds to his own use. He is insolvent too and unable to respond in damages. Would it not be within the jurisdiction of a court of equity in which a suit for the partition of such land was pending, to appoint a receiver to take possession of the property and hold it for the joint benefit of all parties in interest? It seems to us that it would. It is sufficient for us to hold that there are cases of this impression in which it is competent for the court to appoint a receiver."

A special concurring opinion in substance adhered to the opinion of the majority, because in some cases of partition a receiver may be appointed, contrary to the contention of the petitioner, and it therefore *did not appear* that the court exceeded its jurisdiction. But it would be otherwise if it had been made manifest, as was claimed to be the fact, that there were several persons owning the entire estate as tenants in common, all acting in good faith, and for the common interest, and a receiver had been appointed to take possession of the land as against them, and authority had been given to such receiver to turn out of possession a tenant in common who had properly preserved his share of the property and had not done or suffered any act inconsistent with the rights of his cotenants. There was also a dissenting opinion to the effect that by the usages of courts of equity, receivers were never appointed in other than equity cases, of which the action of partition, under the local statute, was not one, it being rather a special proceeding. The ground was further taken that it was a fallacy to hold that because courts of equity did appoint receivers in some cases of partition, therefore the jurisdiction of the court to appoint one could not be questioned in this instance; for the statute referred to cases, not to actions, wherein equity usages could be invoked, and no such exceptional case had been shown. These opinions, though based on local regulations, have been presented in detail because they so thoroughly open up the entire field of controversy. The suggestion of the principal opinion, that a receiver would be properly appointed in cases where the cotenant working the mischief is insolvent, is sustained in the case of *Williams et al. v. Jenkins*, 11 Ga. 595. There the court says, "The plaintiff herein insists that

a court of equity will not interfere and appoint a receiver at the instance of one tenant in common against another, who is in possession, because the party complaining may relieve himself at law by a writ of partition. This position is evidently taken in conformity with the views advanced in *Tyson v. Fairclough*, *supra*. Concede that the complainant in this case might have a writ of partition at law for his share of the property, what adequate remedy has he at law in the meantime for the profits of the mills, while in the possession of the defendants who are *insolvent*? We entertain no doubt that a court of equity has jurisdiction to appoint a receiver at the instance of one tenant in common against his cotenants, who are in possession of undivided valuable property, receiving the whole of the rents and profits, and excluding their companion from the receipt of any portion thereof, when such tenants are insolvent. See to same effect 2 Wait's Prac. 216. So in *Ware v. Ware*, 42 Ga. 408, the appointment of a receiver was directed against an insolvent party who had misappropriated funds which should have been so invested as to secure to the complainant an undivided interest in certain lands.

But in regard to the disposal of rents, it is not always made a pre-requisite that the cotenant controlled should be insolvent. When in an action for partition it is shown that a portion of the property cannot be rented, in consequence of the refusal of one of the tenants in common to unite with the others, and that the rents of the remaining portions cannot be collected because of the interference of such cotenants, a receiver may be appointed to preserve the property from loss *pendente lite*: *Pignolet v. Bushe*, 28 How. Pr. 9.

Again, the aid of a receiver is sometimes granted in action for the partition of real estate between tenants in common, when it is apparent to the court that the relief is necessary to protect all parties in interest, and in such an action, when the defendants not only deny the plaintiff's title, but have endeavored to entangle the whole title, and not disposed to account for the rents and profits, equity may interfere by a receiver: *Duncan v. Campau*, 15 Mich. 414, per CAMPBELL, J.; High on Receivers, sect. 607.

Another instance in which a receiver of the property of cotenants is appointed, is based upon the analogy of partnership cases. When the interest which the parties have in the land is held for the purposes of trade, and their relation to each other resembles that

of partners, a receiver may be appointed, though the facts would not justify that action if the parties were ordinary tenants in common. So when a party was interested in unimproved city lots jointly with another who held the legal title and died, having given his executors a power of sale, it was held that the power was subject to the control of the court for the benefit of such party, and a receiver may be appointed: *Marvin v. Drexel's Ex'rs*, 18 P. F. Smith 362.

A colliery or a mine is in the nature of a trade, and where different persons have interests in it, it is to be regarded as a partnership. Therefore, when there are several shares, as each partner cannot employ a separate manager or set of workmen, the court will appoint a manager or receiver for them all, under the same circumstances which would justify such appointment in the case of a regular copartnership: Freeman on Cotenancy and Partition, sect. 327, citing *Jefferys v. Smith*, 1 Jacob & W. 298; *Fereday v. Wightwick*. 1 Russ. & M. 46.

Of course the case is still stronger where the purchaser of a mining claim at judicial sale is the applicant and the defendant is the judgment-debtor, who remains in possession working the claim and rapidly exhausting it, and is insolvent. The working of the mines, and the extraction of the gold therefrom, is something more than the common ordinary use of real estate by one in possession, and requires more than the ordinary remedies to protect the rights of the purchaser: *Hill v. Taylor*, 22 Cal. 193, 194. See also *Roberts v. Eberhardt*, Kay 159, where Lord HATHERLEY explains that the co-ownership or partnership may be in the working or in the land.

As in the case of tenants in common, so in actions between joint tenants, a receiver will be appointed, as a matter of course, when the joint property is in danger through the acts of one or more of the joint tenants: 2 Wait's Pr. 216.

In case some of the tenants in common are infants, a receiver may be appointed, with directions to pay such as are of age their share of the rents; and if one of the infants becomes of age after the appointment of a receiver, he may apply for the payment of his share to himself: *Smith v. Syster*, 4 Beav. 227; *Rumaden v. Fairthorp*, 1 N. R. 389.

It will be perceived on a consideration of the authorities discussed, that the extraordinary power to appoint a receiver is but

rarely exercised, but is invoked in cases of exclusion from the premises or the rents thereof, of obstruction to the collection of the rents, of attempts to entangle the title, and of practical copartnership in mines which are being worked to exhaustion; and that in all cases of insolvency of the mismanaging tenant aggravates the case and perfects the grounds of the application. But pending a suit for the sale of lands for division among cotenants, equity will not, by appointing a receiver, interfere with the lawful possession of one of the cotenants, who is not shown to dispute the title or to disturb the possession of his cotenants; especially if there is no sufficient averment of insolvency: *Cassetty v. Capps*, 3 Tenn. Ch. 524.

But what constitutes exclusion in the sense intended by the cases which require such conduct? The answer will be apparent from a few illustrations. It constitutes an exclusion when the tenant in common receives the whole rents and profits and refuses to pay over to the other the share due to him: *Sandford v. Ballard*, 33 Beav. 401. A peculiar instance of exclusion is given in the notes to 4 Bro. C. C. 414, of an anonymous case, where a receiver was appointed on the motion of a younger brother, whom the elder brother and heir declined to treat as a tenant in common upon the ground that he was intoxicated when he made the agreement of compromise which created such cotenancy. But when a tenant in common advertised the estate for sale, and gave notice to the tenants to pay their rents to him alone, an application for a receiver was denied on the ground that the conduct complained of did not amount to an exclusion: *Tyson v. Fairclough*, 2 Sim. & Stu. 142.

The rule in regard to an exclusion is equally applicable to a tenancy in common in equitable estates, and if there be no exclusion, a receiver may be appointed of the applicant's share: *Sandford v. Ballard*, *supra*. The other grounds for the appointment of receivers for cotenants have been sufficiently explained. It is to be noted, however, that the alternative of giving security may be offered to the offending cotenant. Thus, where personal property is in the exclusive possession of one of the cotenants who refuses to divide or sell it, or to allow his cotenant to participate in its enjoyment, a receiver may be appointed, unless the defendant gives adequate security to reimburse the plaintiff for the deterioration or destruction of the property by use, and compen-

sate him for the value of the beneficial enjoyment of such property: *Low v. Holmes*, 17 N. J. Eq. 150. See, also, *Delaware, &c., Railroad Co. v. Erie*, 6 C. E. Green 298. So the court may order the tenant in common in possession to give security for the payment of the due proportion of the rents to his cotenants: *Street v. Anderton*, 4 Bro. C. C. 414.

As between tenants in common of personal property, the courts are usually averse to appointing a receiver over the joint property upon the application of one cotenant against the other: *Low v. Holmes*, 2 C. E. Green 148. And one cotenant cannot, on the ground of a refusal of the other to divide the property, maintain a bill in equity for a receiver and for a sale and division, when it is not shown that the chattels were agreed to be or were used in carrying on any business for the joint benefit of the parties, as partners or otherwise; or that the tenancy in common was of such a nature as to require a sale of the chattels or a termination of the tenancy; and when it does not appear that there is any necessity for the division of the property on account of the death or insolvency of one of the cotenants. And this is true, even though the bill charges the defendant with having the sole and exclusive use of the property, and that he is diminishing its value and refuses to make a division thereof; since the remedy for such grievances, if they amount to a conversion of the property, must be sought by an action at law: *High on Receivers*, sect. 20; *Blood v. Holmes*, 110 Mass. 546. So in the case of joint-owners of the machinery and material of a printing office, upon a bill by one joint-owner or tenant in common against the other for a partition of the property, which is in defendant's possession, the court will, as already noted, refuse a receiver if the defendant in possession will give adequate security for the rents and profits *pendente lite*: *Low v. Blood*, 2 C. E. Green 148. In case of the dissolution of a partnership by proceedings in bankruptcy against one member of the firm, the assignees of the bankrupt partner become, as to his interest, tenants in common with the solvent partner. And in such a case, upon an application of a receiver on the ground of exclusion, a court of equity will proceed upon the same principles by which it is governed in all cases where some members of a firm seek to exclude others from that share in the management of the business to which they are entitled: *Wilson v. Greenwood*, 1 Swans. 483.

JAMES P. OLIVER.

RECENT ENGLISH DECISIONS.

High Court of Justice, Queen's Bench Division.

LONDON AND COUNTY BANK v. GROOME.

The rule of law applicable to overdue bills and notes does not apply to checks, and therefore the mere fact that the holder receives a check eight days after date does not render his title subject to any equities or matter attaching to the check which might amount to a defence as between the drawer and payee.

It is a question for the jury whether the check was taken under circumstances which ought to have excited suspicion, and the fact that it was eight days overdue is evidence in deciding the question.

Down v. Halling, 4 B. & C. 330, explained.

FURTHER consideration.

This was an action to recover 98*l.*, the amount due upon a check drawn by the defendant in favor of one Moss, or bearer, and handed by him to one George Colls, who handed it, eight days after date, to his bankers, the plaintiffs, for value.

The check being dishonored, the action was brought before FIELD, J., and a special jury. A verdict for the full amount was entered for the plaintiffs, and the learned judge reserved the case for further consideration upon the question whether the plaintiffs having taken the check eight days overdue took it at their peril with all the equities attaching to it as between the defendant and Colls. The facts are sufficiently set out in the judgment.

Matthews, Q. C. (*J. Paget* with him), for the plaintiffs.

Rose Innes, for the defendant.

The opinion of the court was delivered by

FIELD, J.—This is an action brought to recover 98*l.*, the amount of a check of which the plaintiffs were bearers. It was dated the 21st of August 1880, and it directed the National Bank to pay that sum to A. Moss or bearer; and the statement of claim alleged presentation for payment, non-payment, and due notice of dishonor. The defendant by his statement of defence denied notice of dishonor, and alleged that the defendant, on the 20th of August, handed the check to George Colls under such circumstances as, if proved, and if the latter had been the plaintiffs, might have furnished a good answer to his claim. The statement of defence further alleged that Colls, in fraud, delivered the check to the plaintiffs, who had notice

of the premises. As a separate defence, the defendant further alleged the same circumstances, and that the plaintiffs were the agents of Colls, and had given no consideration, and held the same subject to the equities existing between Colls and the defendant. As a further defence, the defendant said that the check was presented for payment by Colls, and dishonored, and the plaintiffs, at the expiration of eight days, took the same with notice and subject to the equities. At the trial, the plaintiffs proved that Colls was a customer, having an account at one of their branches, and that he had on the 29th of August (eight days after the date) paid in the check to the credit of his account, and that they had given him consideration for the same. The defendant cross-examined the plaintiffs' witnesses, but did not elicit from them any circumstances tending to show any notice or absence of *bona fides* on the plaintiffs' part, or anything which tended to show that the payment of the check by Colls into his account was made under any circumstances which ought to have excited the suspicion of the plaintiffs, as reasonable men of business, that the check was at all tainted with fraud, except the circumstance that the delivery to them was made eight days after the date of the check.

The plaintiffs' counsel contented himself with proving a *prima facie* case; and at the close of it Mr. *Talfourd Salter* said that he had not affirmative evidence to prove any notice to the plaintiffs, and did not wish to address the jury on the question as to the consideration given by the plaintiffs, or the presentation by Colls alleged in the 5th paragraph; but he submitted that, inasmuch as the 5th paragraph alleged that the plaintiffs had taken the check eight days after its date, I was bound to rule that this circumstance alone was sufficient to entitle him to the benefit of the well-established rule of law as applicable to overdue bills of exchange and promissory notes, that those who take them take them at their peril, and stand in no better position than those from whom they take them as to any equities between the latter and the acceptor, or maker, attaching to the instrument; and for his authority on this point he cited the case of *Down v. Halling*. Mr. *Matthews*, for the plaintiffs, denied the existence of any such rule of law, and relied upon the case of *Rothschild v. Corney*. I, for the purposes of the day, ruled against Mr. *Salter*, and directed a verdict for the plaintiffs, reserving, however, for further consideration the question whether the mere circumstance that the plaintiffs took the check eight days

after its date was enough by itself, as a matter of law, to place the plaintiffs in the position of takers at their peril, so as to entitle the defendant to treat them as if they were in the position of Colls, and liable to have their title to sue defeated by any matter attaching to the check which would have amounted to an answer against Colls.

The case was afterwards argued before me on further consideration, when all the authorities on both sides were ably and fully brought before me, and having considered them, I see no reason to alter the view which I took at the trial. That the holder of an overdue bill or note, payable at a fixed date of course appearing upon it, is in the position suggested, is established beyond all doubt, and the reason of the rule is that, inasmuch as these instruments are usually current during the period before they become payable, and their negotiation after that period is out of the usual and ordinary course of dealing, that circumstance is sufficient of itself to excite so much suspicion that, as a rule of law, the endorsee must take it on the credit of, and can stand in no better position than, the endorser: *Brown v. Davies*. But with regard to checks, no such rule has been laid down, the case of *Down v. Halling*, as I shall show presently, not amounting, I think, to any such decision, and there is one case in which that proposition has been denied or doubted.

In *Rothschild v. Corney*, the action was brought by the maker of the check to recover the amount from the defendants. The check was dated the 19th of January. It had been obtained from the plaintiffs by the fraud of Brady; and Brady, on the 24th (five days after date), handed it to the defendants, who cashed it *bona fide*, and afterwards presented it and received the amount from the plaintiffs' bank. At the trial the learned judge directed the jury that if they thought the circumstances of the case were such as ought to have excited the suspicion of a prudent man, and that the defendants had not acted with reasonable caution, they should find a verdict for the plaintiffs, otherwise for the defendants. A rule was then obtained for a new trial, on the ground that the judge ought to have directed the jury that the checks were overdue, and so the defendants took them at their peril, and could have no better title than Brady; but after argument, in which *Down v. Halling* was cited, the rule was discharged, Lord Chief Justice TENTERDEN saying that it could not be laid down as a matter of law that a party taking a check after any fixed time from its date must do so at his

peril. Mr. Justice LITLEDALE observed that, although the rule of law was so as to bills of exchange and promissory notes, it could not be applied to checks.

In *Serrell v. Derbyshire Railway Company*, the check was dated the 13th of August, and was not presented until the 6th of October, and the case of *Down v. Halling* was cited by Mr. Justice CRESSWELL for the proposition of Mr. Justice HOLROYD in it that the defendants having taken the check more than five days after date took it at their peril, and Mr. Serjeant Byles, *arguendo*, said that *Down v. Halling* was not consistent with *Rothschild v. Corney*. Mr. Justice MAULE held that no such strict law existed that a check must, as against the maker under such circumstances, be presented promptly, but that when a reasonable time had passed a check stands on the same footing as a bill of exchange, and holding the check in that particular case might probably be considered in the nature of an overdue bill, and fraud being shown in its inception, the *onus* was thrown upon the plaintiff of showing how he got it. Of course, even with regard to checks, there is no doubt that in the ordinary course of business they are intended almost as cash for early, if not prompt, payment; and it is well-known law that, as between the maker and payee, although there is no absolute duty to present a check promptly, that duty so much exists that exact rules have been laid down beyond what period the payee may not delay presentation if he wishes to avoid the consequences of any damage caused to the maker by the insolvency of the drawee, or other injuries falling upon his shoulders. Having regard to this duty, I have come to the conclusion that, looking to the peculiar circumstances of *Down v. Halling*, and the mode in which the matter was there treated, there is no such conflict between that case and the case of *Rothschild v. Corney*, as has been supposed.

In *Down v. Halling*, the plaintiff sought to recover the amount of a check for 50*l.*, dated the 16th of November 1824; he did not show how that check got out of his hands, but on the evening of the 22d a woman unknown to the defendant bought at his shop goods worth 5*l.*, and tendered the check in payment, he paying her the difference; he presented the check on the following day and received the amount. No evidence having been given by the plaintiff accounting for its having got out of his hands, the defendant claimed a nonsuit on that ground; but Lord TENTERDEN told the jury to find for the plaintiff if they thought that the defendant

had taken the check under circumstances which ought to have excited the suspicion of a reasonable man ; and further (on the authority of *Gill v. Cubitt*, 3 B. & C. 466, which has since been overruled) asked whether the defendant, although not acting fraudulently, had acted negligently in taking the check ; and upon those directions the jury found a verdict for the plaintiff ; and upon a rule having been moved for a new trial on the ground of misdirection, the court supported the direction as to negligence, upon the authority of *Gill v. Cubitt* ; and as to the rule, Mr. Justice BAYLEY is reported to have said, generally, that if a check is taken after it is due, the party taking it can have no better title than the person from whom he took it ; and it is in this passage that he is supposed to lay that proposition down as a rule of law. It must be remembered, however, that Lord TENTERDEN was also a party to the decision in *Rothschild v. Corney*, and could not have intended to hold in that case contrarily to the so recent decision of *Down v. Halling* ; and if the language of Mr. Justice HOLROYD is looked at when he says that five days ought to have excited the defendant's suspicion, and that in the earlier case a reasonable time had elapsed, I think the true result of that case is that the court decided it rather upon its own peculiar facts than as intending to lay down any strict rule of law.

In *Serrell v. Derbyshire Railway Company*, Mr. Justice MAULE says perhaps the two cases may be reconciled ; and, if my view of the character of the decision in *Down v. Halling* is right, I have been able to come to the same conclusion :

I should, therefore, under ordinary circumstances, have contented myself with giving judgment for the plaintiffs ; but I think, assuming this to be the true view of *Down v. Halling*, it follows, from that case, as well as from the other cases, that the true question for the jury being whether the check in the present case was taken by the plaintiffs under such circumstances as ought to have excited their suspicion, and the lapse of eight days being a circumstance undoubtedly, though not conclusive, to be taken into consideration by them in considering that question, I ought to have left that question to the jury. I should, indeed, have done so if I had thought that Mr. *Talfourd Salter* had wished it. From what passed, however, at the argument, I think there may have been some misunderstanding on my part in the matter. It is undoubtedly true that that question was not left to the jury ; and the defend-

ant is entitled to have it put if he so wishes. I therefore give judgment for the plaintiffs with costs, subject to the condition that if the defendant elect within ten days after my judgment to have a new trial he may do so, and in that event the costs of the former trial, and of the further consideration, should abide the event of the second trial.

Judgment for the plaintiffs.

This case seems to have been decided mainly upon a distinction between bills and notes on the one hand, and checks on the other. And it was long ago established in America that, whatever might be the law as to bills and notes, a check need not be presented for payment instantan; and that if taken *bona fide*, though some time after its date, it would not necessarily be subjected to any equities between the maker and the original payee: *In re Brown*, 2 Story 502 (1843); *Ames v. Meriam*, 98 Mass. 294; *First National Bank v. Harris*, 108 Mass. 514; *Lester v. Givens*, 8 Bush 357; *Hymelman v. Hotailing*, 40 Cal. 111.

Although, of course, as explained in the principal case, the time of taking might be so long after its date as to create a presumption of *fact* against the holder which he might be bound to explain: *Cowing v. Altman*, 71 N. Y. 441. But whether there is or is not any difference between bills and notes, and checks, where both are payable *on time*, as to the necessity of a prompt demand, it is clear that even in notes payable *on demand*, as the check in the principal case was, and as they gen-

erally are, the note need not be presented immediately; and that a *bona fide* holder of a note on demand, though taken in several days after date, does not hold it subject to any unknown equities between the prior parties. It is quite sufficient if the note was purchased within "a reasonable time" after date, in order to give the holder a perfect claim. And what is a reasonable time, is a question of law for the court, as generally considered, and not of fact for the jury. And while seven days, or even one month, have been thought not too long (*Thurston v. McKoun*, 6 Mass. 428; *Runger v. Cary*, 1 Met. 369; *Seaver v. Lincoln*, 21 Pick. 267), yet six years, eleven months, eight months, six months, three and a half months have been held too late: *Stockbridge v. Damon*, 5 Pick. 523; *Sylvester v. Crapo*, 15 Id. 92; *American Bank v. Jenners*, 2 Met. 288; *Field v. Nickerson*, 13 Mass. 131; *Thompson v. Hull*, 6 Pick. 258; *Stevens v. Bruce*, 21 Id. 193. Whether the same rule applies to bills of exchange on demand, as to promissory notes of that character, is not so well settled.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Circuit Court, Southern District, New York.

FLAGG ET AL. v. MANHATTAN RAILWAY CO. ET AL.

An agreement between two corporations, whereby one guaranties the other a certain specified annual dividend on its capital stock, is a guaranty to the corporation and not to the stockholders severally, although a memorandum of it is endorsed on each share of stock.

In such a case the directors of the corporation to whom the guaranty is made have power to modify the terms of such guaranty without asking consent of the stockholders, and where such power is fairly exercised, in view of all the circumstances, and in good faith, a court will not interfere, even though, on the same facts, it might have arrived at a different conclusion.

Where an agreement is made by the directors, relinquishing the right to such guaranty, the execution of the agreement will not be enjoined at the suit of a stockholder because three of the directors voting were also stockholders in the guarantor corporation, it appearing that without counting their votes a majority of the directors voted for the measure.

MOTION for a preliminary injunction on a bill in equity by the holders of four shares of stock of the Metropolitan Elevated Railway against the said company and two other companies, known respectively as the Manhattan and the New York Elevated Railway Companies, setting forth substantially the following facts:

Both the Metropolitan and the New York companies owned lines of elevated railways in the city of New York. The Manhattan company owned no line of railway, but was empowered by its charter to lease and operate elevated railways. Its capital stock was \$13,000,000, and its directors persons who were directors of the other two companies. On May 20th 1879, the three companies entered into a tripartite agreement, which recited that it was for the interest of the Metropolitan and New York roads, and of the general public, that the two lines of railway should be run under one management, and which provided that the Metropolitan and New York companies agreed to lease their roads to the Manhattan company, and the Manhattan company agreed to execute two bonds, one to a trustee for the Metropolitan company for \$6,500,000, and the other to a trustee for the New York company for a like amount, which bonds were to be exchangeable for stock of the Manhattan company at par, the Metropolitan and New York companies thus becoming practically the owners of the Manhattan stock. There was also a provision that whenever the Manhattan should declare a larger dividend on its own stock than ten per cent., it should increase the dividends of the other roads to an equal extent. On the same day the leases provided for by the agreement were executed. Each lease stipulated for the payment by the Manhattan company to the lessor company, 1st, of a nominal rental; 2d, of the principal and interest of the bonded indebtedness of the lessor company; and 3d, of an annual dividend of ten per cent. on the capital stock of the lessor company to the amount of \$6,500,000, a guarantee of which by the Manhattan company was

to be endorsed on the certificates of said stock. Each lease also contained a clause of forfeiture and right of re-entry for failure to perform its covenants. Under these leases the Manhattan took possession of and operated the roads, while the other two companies disposed of the Manhattan stock to the general public by sale in the market. On July 2d 1881 proceedings were commenced in the Supreme Court of New York, on behalf of the state of New York, against the Manhattan company to obtain its dissolution, on the ground that it had become insolvent and operating the leased roads at a loss. Under these proceedings the court, on July 13th, appointed a receiver of the Manhattan company. On July 23d 1881 the New York company presented a petition in said proceeding to have their lease declared forfeited, and for a delivery to them of their railway. On October 14th 1881 the court refused the prayer of the petition on the ground that the capital stock of the Manhattan having been transferred to, and sold by, the New York and Metropolitan roads, the innocent purchasers of such stock might, under the circumstances of the case, have claims against the latter roads, which should be passed upon before the prayer of the petition should be granted. Judge WESTBROOK, who delivered the opinion saying, "Is it not most apparent that the innocent holders and purchasers of the stock of the Manhattan company have grave questions to submit to the courts, both as against the lessor companies and also their stockholders who placed the Manhattan stock upon the market to their great injury. * * * It is plain that they should not be ignored and the property asked for, surrendered upon the ground of the non-payment of obligations incurred by the lease when perhaps a trial of the action pending may determine that the Manhattan company is not a debtor to but a creditor of the petitioner." On October 22d 1881 a new tripartite agreement was made between the three companies which set forth that it had been found impracticable to carry out the various terms and conditions imposed by the original agreement and leases on the Manhattan, and that the interests of the parties and of the public required that the roads should be run under one management, and providing that the leases should be modified so that the Manhattan should pay out of the moneys received from operating the railways after payment of expenses and taxes: 1st, To the New York company all moneys due under the original lease on July 1st 1881; 2d, To the Metropolitan

company the interest due on its bonds from January 1st 1881; 3d, To the payment of interest on the bonds of the Metropolitan and New York; 4th, To the payment of the nominal rental stipulated for in said leases; 5th, To the payment to the New York company of a dividend of six per cent. on its stock; and 6th, To the payment to the Metropolitan of a dividend of six per cent. on its stock, the payments to be made and to have preference over each other in the order above enumerated. On the same day a supplemental agreement was executed by the three companies providing that the Manhattan should pay to the New York all sums due and owing under its lease up to and including October 1st 1881, and also that the payment of the dividends to the New York company should be cumulative, and the sums to be paid for dividends only to be payable out of moneys received from the operation of the road prior to the dates at which the sums should grow due under the agreement. To enjoin the execution of these agreements the present bill was filed by stockholders of the Metropolitan on behalf of themselves and of all other stockholders who might join. It alleged that immediately after the execution of the original tripartite agreement the following guarantee was endorsed on the stock certificates of the Metropolitan company, viz.: "The Manhattan Railway Company for value received has agreed to pay to the Metropolitan Elevated Railway Company an amount equal to ten per cent. per annum on the capital stock of the latter company—that is to say on \$6,500,000, payable quarterly, commencing January 1st 1880;" that complainants purchased their stock with knowledge of the provisions of the original tripartite agreement and on the faith of this guaranty; that during the pendency of the negotiations for the second tripartite agreement it was given out and complainants expected that the terms of any arrangement which should be concurred in should be submitted to the stockholders for approval, but that this had not been done; that the agreements of October 22d 1881 subordinated the rights of the Metropolitan company to those of the New York company, and released the Manhattan company from its guaranty; that the officers of the Metropolitan had betrayed its interests; that at an election of directors, held in July 1881, Russell Sage and Jay Gould became for the first time directors of the Metropolitan; that the Manhattan being shortly thereafter placed in the hands of the receivers, its shares became depressed in value and were largely

purchased by Jay Gould ; that on October 8th 20,000 shares stood in his name, 1000 in the name of his son, 1100 in the name of W. E. Connor and 12,400 in the name of W. E. Connor & Co., in which firm Gould was a partner ; that all of said shares were held in the interest of Gould ; that Russell Sage, who was also president of the Metropolitan, and as such executed the agreement of October 22d 1881, was largely interested in stock of the Manhattan ; that both Gould and Sage took an active and the principal part in the negotiations which led to the agreements of October 22d 1881 ; that the negotiations on the part of the New York company were conducted by its president, Cyrus W. Field, who was also largely interested in Manhattan stock ; and that the agreements of October 22d 1881 were corruptly executed for the personal ends of the signers of the same. The bill further charged that the Metropolitan, about November 1st 1879, executed a second mortgage for \$4,600,000, only \$2,000,000 of the bonds of which had been issued, and that the company proposed to deliver the balance of the bonds to the Manhattan for negotiation, the latter company to receive the proceeds ; and that the board of directors of the Metropolitan, by cancelling the guarantee of the Manhattan on the bonds of the company as the same were transferred, and in various other ways, were endeavoring to compel dissentient shareholders to acquiesce in the terms of the said agreements.

The bill prayed for a decree that the agreements of October 22d were null and void, and for an injunction to prevent the companies from carrying out the same.

S. P. Nash, for plaintiffs.

D. D. Field, for defendants.

The opinion of the court was delivered by

BLATCHFORD, C. J. (after stating the facts.)—The principal ground urged in support of the motion is that the agreements of October 22d impair vested rights of the stockholders of the Metropolitan ; that each stockholder has for himself such vested rights, and that these rights cannot be impaired as to him without his consent. It is urged that after the Metropolitan lease was executed there was no property left to it upon which anything in the nature of a divided-paying stock could be based, except the revenue to be derived from the terms of the lease ; that

the value of the capital stock consisted wholly in such revenue; that the \$162,500 to be paid quarterly to the Metropolitan was the only profit which investors in the stock could hope to realize from their investment; that the stock is stock of a special character, entitled to an agreed portion of a rental to be paid by the Manhattan; that the agreement of the Manhattan is truly expressed in the memorandum on the certificates; that, by the whole transaction, the Metropolitan agrees to distribute such portion of the rental as a dividend among its stockholders; that the Metropolitan, therefore, cannot surrender the guaranty of the Manhattan; that such guaranty must be regarded as a promise to the Metropolitan for the benefit of its stockholders; and that they are entitled to prevent the Metropolitan from diverting the fund or impairing the contract out of which the right to it comes.

It is undoubtedly true that the object of the provisions of the lease in regard to the 10 per cent. per annum on \$6,500,000, to be paid by the Manhattan to the Metropolitan, was to enable the stockholders of the Metropolitan to have, if possible, during the continuance of the lease, a quarterly dividend of $2\frac{1}{2}$ per cent. on their stock. But I fail to see any contract to that effect between the Manhattan and the individual stockholders of the Metropolitan, or between such stockholders and the Metropolitan. The language of article 2 of the lease is that the Manhattan guaranties to the Metropolitan an annual dividend of ten per cent. on the capital stock of the Metropolitan to the amount of \$6,500,000, that is to say, the guaranty is to the Metropolitan, not to its stockholders severally. The article then goes on to interpret the guaranty, and to show what it is, and at what times payments under it are to be made. It says, "that is to say," the Manhattan will, each and every year during the term beginning with October 1st 1879, pay to the Metropolitan \$650,000, free of all taxes, in equal quarterly payments of \$162,500 each, on the first days of January, April, July and October in each year, the first to be made January 1st 1880. There is no agreement, either by the Manhattan or the Metropolitan, that these sums shall be paid to the stockholders of the Metropolitan. Then there is the further provision that the Manhattan will, from time to time, execute in proper form a guaranty "to the above effect," printed or engraved on the certificates of stock of the Metropolitan, and, as such stock certificates are surrendered for cancellation and reissue, will, from time to time,

at the request of the holder, "renew such guaranty" upon all reissued certificates. This was never done. The Manhattan never executed anything on the certificates. The Metropolitan issued the certificates with an unexecuted memorandum, which does not contain the word "guaranty," and contains no contract or agreement or guaranty of any kind, but only a statement that the Manhattan has agreed to pay to the Metropolitan an amount equal to 10 per cent. per annum on the capital stock of the Metropolitan; that is to say, on the \$6,500,000, payable quarterly, commencing January 1st 1880. This was the interpretation put at the time on the agreement of the Manhattan by the Metropolitan, and accepted by each stockholder of the Metropolitan when he took his certificate. If any stockholder was entitled, on a request to the Manhattan, to a guaranty of any kind executed by it on his certificate of stock, he waived his right to it. But, if he had asked for and received it, it would have been "a guaranty to the above effect," being a repetition of the agreement to make the quarterly payments to the Metropolitan; that is, an agreement to do what the memorandum states that the Manhattan had agreed to do. This would not have been any more of a contract between the Manhattan and the stockholder, or between the Metropolitan and the stockholder, than now exists.

The case, therefore, is not one of any vested right in the stockholders of the Metropolitan to the 10 per cent. payments, but it depends on the general power of the directors of a corporation to make and modify its contracts. That power is well established in this state: *Hoyt v. Thompson's Exr's*, 19 N. Y. 207, 216. Nor can the stockholders control that power: *McCullough v. Moss*, 5 Denio 566, 575. No statute or authority is referred to which makes it necessary to the validity of the agreements of October 22d that they should have been approved by any one or more stockholders.

The leases and the tripartite agreement and the agreements of October 22d were made under the authority of the Act of April 23d 1839 (Laws of New York, 1839, c. 218, p. 195), which provides that "it shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract." There is nothing to impeach the validity of that statute. The instruments referred to are con-

tracts by the Manhattan and the other two companies for the use by the former of the roads of the latter, on terms satisfactory to each of the latter, as determined by the votes of their boards of directors.

It is urged that the question should be considered as if the Metropolitan, on the failure of the Manhattan to fulfil its covenants in the lease, had re-entered, and as if the question were as to a new lease, with terms such as now obtain in the lease as modified. In this view the new lease is objected to as *ultra vires*, because it appropriates the revenues of the Metropolitan, as a part of the general funds of the Manhattan, to pay preferred dividends to the New York. The contention is that the Manhattan is to receive all the earnings of the lines of the Metropolitan, and, after paying expenses, taxes, interest, etc., is to pay, first, a dividend of 6 per cent. on the stock of the New York ; and that, as the earnings of the Metropolitan are not to be kept separate, no such arrangement can be made without the consent of the stockholders of the Metropolitan. The question is not one of power, but of good faith. If, in good faith, the discretion and judgment of the directors of the Metropolitan were fairly exercised, under the circumstances in which the affairs of the corporation were at the time, in view of all its embarrassments, and of the condition of the Manhattan, and of the litigations existing and threatened, and of the claims made against the Metropolitan and its stockholders by the Manhattan and the stockholders of the Manhattan, and of the relative conditions of the two properties, and of the past and the probable prospective earnings of the roads of the New York and the Metropolitan, no court will undertake to interfere with the exercise of such discretion and judgment, even though on the same facts, it might have arrived or may arrive at a different conclusion, and even though the stockholders of the Metropolitan might have arrived at a different conclusion. In this view the remarks cited from the decision of Judge WESTBROOK become of great importance. His views in regard to the claim of the Manhattan for the \$13,000,000 were calculated to have great weight, and it is shown they did have great weight in regard to some of the terms of a new arrangement. The Manhattan had made two defaults in paying the dividend rentals, it had been put into the hands of receivers, it was alleged to be insolvent, and it was asserting the claims for \$13,000,000. It was perfectly clear that the interests of the public demanded that the two elevated

roads should be under one management, and the interests of the public were the interests of the two lessor companies. The state of things was such that the common manager must be the Manhattan. Therefore, its obligations to the other two companies must be modified, because they were too onerous to be fulfilled. The only question was as to the new obligations. The evidence satisfactorily shows that the roads of the Metropolitan were not earning enough net money, over expenses, repairs and taxes, to pay the interest on its mortgage bonds, and that the New York was earning at least 6 per cent. net, and enough more to make reasonable the preferences given to it over the Metropolitan in the new arrangement. By that agreement the claims of the Manhattan for the \$13,000,000 are released. But whatever conclusion now a judicial tribunal would come to, on proofs, as to whether the new arrangement was a wise and proper one for the Metropolitan to make, it is sufficient to say that, on the evidence now presented as to what was before the directors of the Metropolitan, and as to their action, they had a right to think, in good faith, that they were doing what was most judicious for their stockholders, and they did what they did in good faith.

It is contended that a fictitious necessity was created, and that the stockholders of the Manhattan would have come forward to extricate it from its difficulties. I see no evidence of this. The directors of the Metropolitan had this question before them, necessarily, and passed upon it and acted in view of it.

It is alleged in the bill that Messrs. Sage and Gould, while acting as directors of the Metropolitan to make the new arrangement in its behalf, were large holders of the stock of the Manhattan Company, and that Mr. Field was at the time a large shareholder in the Manhattan. The directors of the Metropolitan who voted to approve the agreement of October 22d were Messrs. Sage, Gould, Connor, Sloan, Dillon, Navarro, Stout, Dodge and Porter. Mr. Garrison was absent. Mr. Kneeland voted in the negative. Leaving out Messrs. Sage, Gould and Connor, six of the ten present voted in favor of the agreement. As to the supplemental agreement, there were ten directors present, Mr. Sloan being absent. Mr. Stout did not vote. Of the nine voting, Messrs. Sage, Gould, Dillon, Navarro, Connor, Dodge, Porter and Garrison voted to approve the supplemental agreement, and Mr. Kneeland voted in

the negative. Leaving out Messrs. Sage, Gould and Connor, five of the nine voting voted to approve the supplemental agreement. There were eleven directors in all. Nothing is alleged in impeachment of the positions of Messrs. Sloan, Dillon, Navarro, Garrison, Stout, Dodge or Porter. Therefore, whatever may be shown as to the positions of Messrs. Gould, Sage and Connor, the legal aspect of the transaction is not affected.

Mr. Gould was elected a director of the Metropolitan on July 9th 1881. He states that at the time of making the settlement of October 22d he had an interest of 2500 shares in the Metropolitan, and of 5000 shares in the New York, his cash investment for the two being \$710,354.21, while his actual cash investment in the Manhattan was \$599,031.25.

Mr. Sage states that at the time of the agreement of October 22d he held about 1200 shares of stock in the Metropolitan. He was appointed president of the Metropolitan in July, 1881. He says that at that time he had about 800 shares of the Manhattan stock, but within a few days thereafter "was short" of Manhattan stock, and from that time until after the agreement of October 22d bought no stock of the Manhattan, nor became interested in any except for the purpose of fulfilling previous contracts; and that his pecuniary interest, if he "had any during the period, was to raise the price of Metropolitan stock and depress the price of Manhattan stock."

Mr. Field states that he sold out all his Manhattan stock, except 13 shares, in November, 1879, and sold those in March, 1880; and that he never bought or became interested again in Manhattan stock until October, 1881, after he "became convinced that a compromise would be made." But he sustained no fiduciary relation to the stockholders of the Metropolitan.

The concurrent testimony is that the Manhattan is now entirely solvent; made so, it is true, by the new arrangement, but still solvent. It is out of the hands of the receivers. The tripartite agreement and the leases, except as modified, are in force, and are in force as modified. The mortgage bonds, the issuing of which is sought to be restrained, are to be issued, it appears, under the tripartite agreement and the leases, and pursuant to resolutions passed before the agreement of October 22d, and their proceeds are to be used in perfecting the structure and equipment of the

Metropolitan, and in securing the safety of those who travel on the road.

The motion for an injunction is denied.

This important decision affects the security of large amounts of money invested on the faith of the general opinion that such contracts cannot be impaired without the consent of the holder of such securities. Experience has demonstrated that in leases fairly entered into, the value to the general business of the lessee requires performance in the interest of creditors of the lessee even after insolvency and although the direct earnings may not equal the rental.

The result is more marked in the present case, because the guaranty of a dividend of ten per cent. under the tripartite lease or agreement of May 1879 between the Metropolitan Railway, the New York Railway (the two companies owning the New York elevated roads) and the Manhattan company, was (in accordance with a stipulation contained in the agreement) printed on the face of each certificate of shares in the Metropolitan issued and reissued to purchasers after the consummation of that agreement.

This case supports the methods, by which this guaranty was abrogated by the directors of the two companies, as well as the right of the directors to do so.

The release of the guarantied ten per cent. dividend by the subsequent agreement of October 1881, which, quoting from the language of the judge "appropriated the revenues of the Metropolitan as a part of the general funds of the Manhattan to pay preferred dividends to the New York Railway Company," was carried into effect by the aid of the votes of Russell Sage, the president of the Metropolitan, and of Jay Gould and Connor, three directors of the Metropolitan, who were each interested in stock of the Manhattan. It was also alleged in the bill that "Gould and Sage took an active and principal part in the

negotiations which led to the agreement," Gould was also interested in the stock of both the other companies. These directors were incapable of taking any part in the negotiation of a transaction which directly benefited themselves. A director, according to the opinion of WELCH, J., in *Goodin v. C. W. & C. Co.*, 18 Ohio St. 169, "as soon he finds he has personal interests which are in conflict with those of the company ought to resign," and the contract in that case was set aside at the suit of a stockholder on account of such interest.

The court supports the action of the board of directors in releasing the right to the preferred dividend, because independently of those directors so voting and disqualified, because interested adversely in the subject of the contract, the six other directors voting for it constituted a majority of the board, and they do not appear to have had any such adverse interest.

It does not appear that these six directors had any interest in the company of which they were directors. Such an interest is in no sense essential to their acting as directors, but was a material subject of inquiry in the case because the transaction was attacked by stockholders of the Metropolitan as made in bad faith. In fact the bill set up that it was a betrayal of their true interests.

In a question between a third party contracting with the Metropolitan Railway, who set up the invalidity of the agreement on account of the interest of the three directors, the answer would have been that the agreement was valid because executed by a majority of the board, without the three interested ones; this was the view in the *Rolling Stock Co. v. The Railroad*, 34 Ohio St. 465. It does not follow even from that case that if stockholders had dissented it

would have bound them. In the absence of dissent on the part of their principals even the action of the three interested directors was valid as to strangers.

Does this rule apply where the plaintiffs, stockholders of the Metropolitan, complained that their interests had been sacrificed in the arrangement by two of their fellow stockholders, also directors, who, holding adverse interests, not only voted as directors and influenced the other members, but also were active parties in bringing about the arrangement, and by a third director who appeared to be interested to the extent of 12,000 shares in the stock of the Manhattan company, the lessee. In the case of *Butts v. Wood*, 38 Barb. 181, the action of the majority of two in a board composed of three, passing upon the claim of the third director who also voted, was set aside at the instance of one of the stockholders. There was, however, in this case a family relationship between the members.

This case therefore presents a different question, and the legality of the action of the Board so circumstanced, we think will not be found to depend upon the fact that a majority of the Board were not disqualified by interests from voting.

The facts as presented do not show that the interest of Sage and Gould or of Connor was known to the other directors; this was a material fact, as to the action of a board which is consulting and advisory as to the action of its officers. "For," says GROVER, J., in *Ogden v. Murray*, 39 N. Y. 202, "the shareholders of a corporation are entitled not only to the votes of the directors whom they have appointed, but also to their influence and argument in the discussion which leads to the passage of their resolutions:" *Aberdeen Railway Co. v. Blakie*, 1 Macqueen H. L. Cas. 461. And where the president and two directors of the railroad company subsequently became stockholders in the construction company, it was held the stockholders

might ratify or disaffirm; but a ratification in ignorance of the material facts did not estop them: *Kelly v. The Railroad Co.*, 77 Ill. 426.

When it is considered that the board is nominated and elected by the holders of the controlling interest in the stock, that often a majority of the directors have but a nominal interest in the company, that they must naturally be influenced by those holding the controlling interest, then such directors should be held strictly to the limit of power growing out of agency in joint associations for trading purposes, and the question of mala fides becomes immaterial, from the absolute necessity of treating such transactions as fraudulent *per se* and voidable as other transactions entirely blameless in themselves are treated under the statutes of fraud, on account of their liability to gross abuse, and for the protection of society: *Michoud v. Girod*, 4 How. 554; *Cumberland Coal Co. v. Sherman*, 20 Barb. 553; *Aberdeen Railway Co. v. Blakie*, 1 Macqueen H. L. Cas. 461.

The rights of stockholders *inter se* are not governed in respect to the action of the Board by the same rules as govern dealings with strangers.

For the rights of the stockholders among themselves, in their relation to the governing body, we look to the law of partnership and of agency growing out of it. Stockholders are treated in this respect exactly as partners.

Directors are agents of the corporation, and as such are agents of the stockholders, but agents of the whole body of stockholders, of the minority as well as of the majority which elects them. "The directors are the trustees or managing partners, and the stockholders are *cestui que trust*, and have a joint interest in all the property and effects of the corporation:" *Koehler v. Black River Fall Iron Co.*, 2 Black 720; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553. BLACKBURN, J., says in *Taylor v. Chi-*

Chester Railway Co., L. R., 2 Exch. 378, "as the shareholders are in substance partners in a trading concern, the management of which is committed to the body corporate, a trust is by implication created in favor of the shareholders, that the corporation will manage the corporate affairs, and apply the corporate funds for the purpose of the original speculation. The rights thus conferred on the shareholders as between them and the corporation are very analogous to those between partners, and like those, depend upon the terms on which the parties entered into the joint speculation. Any shareholder has a right to object to any act being done which is in contravention of the rights thus given to him. Though the majority of the shareholders or even all but himself approved, yet he has a right to object to the making or the enforcing of a contract to do any unauthorized act which would affect his individual interest," and he cites the opinion of the Vice-Chancellor (KINDERSLEY) in *The Earl of Shrewsbury v. North Staffordshire Railway Co.*, 35 L. J. Ch. 172: "I am of opinion that neither the majority of directors nor the vote of the majority of shareholders at a general meeting could authorize the application of any part of the funds of the company to the purchase of such, or countenance and support it even as against a single dissentient stockholder."

So in *Pickering v. Stephenson, L. R., 14 Eq. 322*, speaking of the powers of the directors of a railway company at p. 340 the Vice-Chancellor says: "The principle of jurisprudence which I am asked here to apply is that the governing body of a corporation which is in fact a trading partnership, &c."

This principle is fully set forth in the late work on private corporations by Morawetz. Applying this principle to the rights of the minority or of any one complaining stockholder in the present case, it is clear that neither of the interested stockholders could as partners in a trad-

ing company have voted or influenced the action of the joint concern in a contract to which they were parties on the other side, and what they could not do themselves they could not do through their agents, the governing body, against the consent of copartners: *Black v. Del. & R. Canal Co.*, 24 N. J. Eq. 453.

"Directors," says Mr. Justice DAVIS, in *Koehler v. Black River Fall Iron Co.*, 2 Black 720, "cannot thus deal with the important interests intrusted to their management; they hold a place of trust, and by accepting the trust are obliged to execute it with fidelity not for their own benefit but for the benefit of the stockholders of the corporation."

Notably was this principle applied in *Card v. Hope*, 2 B. & C. 661, where the majority owners of a ship who by the sale of their shares on condition that a certain person should go as master, by this agreement disqualified themselves from an exercise of their judgment in the choice of a master which the other owners were entitled to expect.

So also in *Cumberland Coal Co. v. Sherman*, 30 Barb. 553, per DAVIS, J.: "There can be no question I think at the present that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary character towards his principal."

The board is a unit, the action of the board is the act of all the members; it binds those absent and those voting in the negative, and they are the agents of each and every stockholder, and it reasonably follows they cannot create by their vote an interest adverse to any one stockholder, whether in favor of a stockholder or of a director, any more than a majority of the stockholders could at a meeting of the corporations.

In this view of the absence of evidence of bad faith, or evidence of good faith in the transaction, is immaterial. In such transactions it is found that the consciences of men will not stand the

strain of self interest, and courts will not inquire whether the transaction was a beneficial one or not for the corporation. "Constituted as humanity is, in the majority of cases duty would be overborne in the struggle." *Marsh v. Whitmore*, 21 Wall. 178-183. For this reason Mr. Justice FIELD says: "the law therefore will always condemn the transactions in his own behalf, when, in respect to the matter concerned, he is the agent of others and will relieve against them whenever their enforcement is reasonably resisted. See also *Michoud v. Girod*, 4 How. 503.

For the same reason a director cannot purchase the rolling stock at a judicial sale. He cannot represent the company in transactions with another company in which he is shareholder; nor can the same persons act as agent of different companies in their mutual transactions: *Morawetz on Private Corporations*, sec. 245 and cases cited.

What one joint owner or corporator could not do to bind the joint concern, he cannot do by a body acting as his agents. The three directors who were concerned in interest in the other companies could not vote, advise and influence the making of the agreement of October 1881, and the other directors were incompetent to make a contract beneficial to one or more of their own number.

The fact that these three directors who had an interest in the subject-matter of the contract, constituted only a minority of the Board, does not validate the action of the Board. In the well-considered case of *Cumberland Coal Co. v. Sherman*, 30 Barb. 553, this subject was carefully considered and the following remarks are applicable: "Neither are the duties or the obligations of a director or trustee altered from the circumstance that he is one of a number of trustees, and that this circumstance diminishes his responsibility or relieves him from any incapacity to deal with the property of his *cestui que trust*. The same principle

applies to him as one of a number as if he was acting as a sole trustee.

In the *Aberdeen Railway Co. v. Blakie*, 1 Macqueen H. L. Cas. 461, it was held that it made no difference whether the party whose act or contract is called in question is only one of a body of directors, not a sole trustee or manager. "It was Mr. Blakie's duty to give to his co-directors and through them to the company the full benefit of all the knowledge and skill which he could bring to bear on the subject. • He was bound to assist them in getting the articles contracted for at the cheapest possible rate, as far as related to the advice he should give them he put his interest in conflict with his duty, and whether he was sole director or one of many can make no difference."

Whether the American courts will hold as the House of Lords did in that case, that any contract by a railway company with a firm in which a director was co-partner is void, may be doubted: *Ashhurst's Appeal*, 60 Penn. St. 290. *The Rolling Stock Co. v. The R. Road*, 34 Ohio St. 465, holds such transactions voidable. If voidable, the right of the stockholders to do so is not affected, because individual directors and not the whole board were interested. Nor will the question depend on whether a sufficient number of directors not interested ratified the contract: see *Koehler v. The Black River Fall Iron Co.*, 2 Black 720. The question is not without serious difficulties or embarrassments. But the necessity appears imperative, that interested directors should withhold from taking any part in the action or deliberations of a board in regard to a subject in which they were personally interested with the other contracting parties.

The view of the court is that the directors of the Metropolitan had it in their power to annul and modify the lease so as to release the Manhattan company from the payment of the guarantied dividend of ten per cent.

on the stock of the lessor company without the assent of the stockholders, and to substitute a new relation which is best described as that of bailees to run that road in the interest of the three companies, without any interference by the directors of the Metropolitan.

It is sustained on the ground that the contract to pay a dividend on the stock of the Metropolitan was with the corporation and not with the stockholders, and that the directors, as the governing body, were competent to vary the contract to the extent of releasing the lessee company from the absolute contract to pay, and to substitute a contingent dividend to be earned out of the road operated by the former lessees after appropriating the joint receipts of the two roads, first for the benefit of the stockholders of the New York company.

This new arrangement should be described as a cancellation of the lease and substitution of a new contract by which the management of the Metropolitan was delegated to the Manhattan, allowing the Metropolitan to participate with the Manhattan in the eventual earnings of their own road.

Does such an exercise of discretion necessarily arise from the fact that they are the governing body of a corporation. The powers of the board are as varied as the subjects which they administer; they are implied powers growing out of the relation of agency, and it is conceived that no powers are implied under the law of agency to authorize directors to change the status of the company from that of a leased road, with a guaranteed dividend to preserve which the board were elected by the stockholders; to such a radically different relation as the present one discloses, in which the dividends became dependent upon the contingency of their being earned, through the management of a third party selected by the directors to manage the road instead of themselves.

And in this view the expressions of

Vice-Chancellor KINDERSLEY, referred to by Justice BLACKBURN in *Taylor v. The Chichester Railway Co.*, are pertinent. "When you speak of *ultra vires* of the company you mean one or other of two things, either that you cannot bind all the shareholders to submit to it, or it is *ultra vires* in this respect, that the legislature for instance having authorized you to make a railway you cannot go and make a harbor. But in the present case the latter question does not arise. The question is whether it is *ultra vires* as being beyond the power of the directors to bind all the shareholders."

The conclusion does not necessarily seem to follow that because under the New York decisions, quoted in the opinion, the directors, and not the shareholders are the governing body of a corporation, that the power of the directors extends to create such a changed relation of the stockholders as in this case. And peculiarly so because the agreement required each certificate issued and reissued by the Metropolitan, to have the fact of the holder being entitled to a guaranteed dividend to be put on the face of the certificate.

The rule which controls the exercise of the power by the directors limit it to the objects they were appointed to carry out. The stockholders, complainants, had entered into a body, the fundamental idea of which is that they had acquired a right to a fixed dividend guaranteed by a lessee who had assumed the risks of the business, in consideration of certain advantages accruing to the lessees. The board of such a company has by implication entirely distinct powers from the nature of the case, from one selected to conduct a company engaged in transportation. Their duties are to protect the lessors, to see that the lessees comply with their engagements, and to enforce the rights of the lessors as to the property leased.

Consideration might require the board in their discretion for the purpose of pro-

testing the rights of their constituents to forego the payment of the instalments of dividends, in certain events to agree to a reduction or to foreclose, to re-enter and possess themselves of the property, and to resume their first business as carriers, if in their judgment the interests of their constituents required it.

It is difficult to specify the limits within which the courts will restrain their powers in protecting the rights of the lessors. But is it certain that those powers can be construed to enable them to destroy or set aside the fundamental position of the association which they were the managers to preserve, any more than the stockholders could by the vote of a majority as against a dissentient stockholder? *Black v. Delaware & R. Canal Co.*, 24 N. J.

Eq. 455, in which case the lease of a railroad by legislative authority was held such a radical change of the condition of the company as to be void against a single dissentient stockholder. The change in this case was equally great. Their powers in the present case are held to extend to enable them to release the payment of the dividend by the lessees without re-entering and retaking the leased estate, but leaving it in the hands of the lessees to apply the net earnings after the payment of taxes and covenanted interest on bonds as a joint fund with that of the New York road, to the payment of a cumulative dividend of six per cent. to the New York road, leaving only a resulting interest for the Metropolitan in the business conducted by the Manhattan.

MORTON P. HENRY.

New York Court of Appeals.

AUERBACH v. NEW YORK CENTRAL, &c., RAILROAD COMPANY.

Where it is expressed in terms upon a railway ticket that it is not good unless "used" on or before a certain day, a presentation of the ticket and its acceptance by the conductor before midnight of that day, although the journey is not completed until the next morning, will be held to be a compliance with the condition.

Where a railway ticket binds the passenger to a continuous journey, he is not bound to commence his journey at the starting point named in the ticket, but may enter the train at any intermediate station on the route.

ACTION by a passenger to recover damages for being ejected from defendant's cars. The material facts of the case are as follows:

The plaintiff being in St. Louis on the 21st of September 1877, purchased of the Ohio and Mississippi Railway Company a ticket for a passage from St. Louis, over the several railroads mentioned in coupons annexed to the ticket, to the city of New York. It was specified on the ticket that it was "good" for one continuous passage to point named "in coupon attached;" that in selling the ticket for passage over other roads, the company making the sale acted only as agent for such other roads and assumed no responsibility beyond its own line; that the holder of the ticket agreed

with the respective companies over whose roads he was to be carried to use the same on or before the 26th of September then instant, and that if he failed to comply with such agreement, either of the companies might refuse to accept the ticket or any coupon thereof and demand the full regular fare which he agreed to pay. He left St. Louis on the day he bought the ticket, and rode to Cincinnati and stopped there a day. He then rode to Cleveland and stayed there a few hours, and then rode to Buffalo, reaching there on the 24th, and stopped there a day. Before reaching Buffalo he had used all the coupons except the one entitling him to a passage over the defendant's road from Buffalo to New York. The material part of the language upon that coupon is as follows: "Issued by the Ohio and Mississippi Railway on account of New York Central and Hudson River Railroad one first-class passage, Buffalo to New York."

Being desirous of stopping at Rochester the plaintiff purchased a ticket over the defendant's road from Buffalo to Rochester, and upon that ticket rode to Rochester on the 25th, reaching there in the afternoon. He remained there about a day, and in the afternoon of the 26th of September he entered one of the cars upon the defendant's road to complete the passage to the city of New York. He presented his ticket with the one coupon attached to the conductor, and it was accepted by him and was recognised as a proper ticket, and punched several times until the plaintiff reached Hudson, about three or four o'clock A. M., September 27th, when the conductor in charge of the train declined to recognise the ticket, on the ground that the time had run out, and demanded \$3 fare to the city of New York, which the plaintiff declined to pay. The conductor with some force then ejected him from the car.

The trial judge nonsuited the plaintiff on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from any intermediate point to New York. The general term affirmed the nonsuit upon the ground that although the plaintiff commenced his passage upon the 26th of September he could not continue it after that date, on that ticket.

The opinion of the court was delivered by

EARL, J.—We are of the opinion that the plaintiff was improperly nonsuited. The contract at St. Louis evidenced by the ticket and coupons there sold was not a contract by any one company or by all the companies named in the coupons jointly for a continuous

passage from St. Louis to New York. A separate contract was made for a continuous passage over each of the roads mentioned in the several coupons. Each company, through the agents selling the ticket, made a contract for a passage over its road, and each company assumed responsibility for the passenger only over its road. No company was liable for any accident or default upon any road but its own. This was so by the very terms of the agreement printed upon the ticket. Hence, the defendant is not in a position to claim that the plaintiff was bound to a continuous passage from St. Louis to New York, and it cannot complain of the stoppages at Cincinnati and Cleveland. *Hutchinson on Carriers*, sect. 579; *Brooks v. The Railway*, 15 Mich. 332.

But the plaintiff was bound to a continuous passage over the defendant's road—that is, the plaintiff could not enter one train of the defendant's cars and then leave it, and subsequently take another train and complete his journey. He was not, however, bound to commence his passage at Buffalo. He could commence it at Rochester or Albany, or any other point between Buffalo and New York, and there make it continuous. The language of the contract, and the purpose which may be supposed to have influenced the making of it do not require a construction which make it imperative upon a passenger to enter a train at Buffalo. No possible harm or inconvenience could come to the defendant if the passenger should forego his right to ride from Buffalo and ride only from Rochester or Albany. The purpose was only to compel a continuous passage after the passenger had once entered upon a train. On the 26th of September the plaintiff having the right to enter a train at Buffalo, it cannot be perceived why he could not, with the same ticket, rightfully enter a train upon the same line at any point nearer to the place of destination.

When the plaintiff entered the train at Rochester on the afternoon of the 26th of September and presented his ticket and it was accepted and punched, it was then used within the meaning of the contract. It could then have been taken up. So far as the plaintiff was concerned it had then performed its office. It was thereafter left with him not for his convenience but under regulations of the defendant for its convenience that it might know that his passage had been paid for. The contract did not specify that the passage should be completed on or before the 26th, but that the

ticket should be used on or before that day, and that it was so used seems to us too clear for dispute.

The language printed upon the ticket must be regarded as the language of the defendant, and as it is of doubtful import the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous from St. Louis to New York, or that it should actually commence at Buffalo and be continuous to the city of New York, or that the passage should be completed on or before the 26th of September, such intention should have been plainly expressed and not left in doubt as might, and naturally would, mislead the passenger.

We have carefully examined the authorities to which the learned counsel for the defendant has called our attention, and it is sufficient to say that none of them are in conflict with the views above expressed.

The judgment should be reversed and a new trial granted, costs to abide the event.

1. At about the same time that the principal case was decided a case of a similar nature was decided, and in the same way, in the St. Louis Court of Appeals. The case was that of *Evans v. St. Louis, &c., Railroad Co.*, and is noted in the Central Law Journal of June 23d 1882. So far as we have been able to discover, the point in issue had not previously been raised, and it is somewhat curious that it should have been passed upon by these two courts at the same time. These decisions will no doubt be regarded as settling the question, and establishing the proposition that a railway ticket on which is printed a stipulation that it is not good unless used on or before a certain day, is good for the journey contracted for if presented before midnight of the day on which it expires, although the journey is not complete until the next day or days.

2. That a railroad company has the right to limit the period within which a ticket issued by it will be recognised is a proposition not considered in the principal case, but assumed and passed without comment. And for that matter

comment was wholly unnecessary. The truth of the proposition is now everywhere conceded, being well established by the authorities: *Boston, &c., Railroad Co. v. Proctor*, 1 Allen 267; *Churchill v. The C. & A. Railroad Co.*, 67 Ill. 390; *State v. Campbell*, 32 N. J. Law 309; *Shedd v. Troy, &c., Railroad Co.*, 40 Vt. 88; *Johnson v. Concord Railroad Co.*, 46 N. H. 213.

3. In *Pier v. Finch*, 24 Barb. 514, the Supreme Court of New York passed on the following ticket: "New York & Erie Railroad. Corning to Elmira. Please keep this in sight. Good this trip only. Oct. 19th 1854." The holder of the ticket did not take passage until December 25th following, when he was forcibly put off the train, the conductor refusing to receive the ticket because it was dated several days previously. It was contended that the ticket was limited to a ride in the next passenger train going from Corning to Elmira after the purchase of the ticket, or at all events that the right was limited to the day on which the ticket bore date. The court said: "The words which are

supposed to limit the undertaking to some specific train of cars or period of time, and the only words which are claimed to have that effect are 'good this trip only.' It is quite apparent, I think, that these words have no reference to any particular day or hour whatever. They do not relate to time, but to a journey. 'This trip.' What trip? A trip, in its ordinary signification, means a journey, jaunt or excursion by some person; and as the ticket is given to the passenger as evidence of his right, 'this trip' must be construed to mean the journey such passenger proposes to make, and does not become operative until he undertakes it."

Where the ticket is stamped "Good for this train only," and dated, the right is limited to a passage on the company's cars on the day of its date: *Boice v. Hudson River Railroad Co.*, 61 Barb. 611; *Elmore v. Sands*, 54 N. Y. 512. In *Gale v. Delaware, &c., Railroad Co.*, 7 Hun 670, it is held that a ticket "good for this day and train only," and dated on the day of its issue, authorizes a passenger to select any train on that day, but not to stop over and perform the residue of his journey on another train.

Where a coupon is stamped "not good if detached" from stub, it confers no right of passage on the holder after it has been detached in violation of the condition: *Walker v. Railroad Co.*, 33 How. Pr. 327; *Houston, &c., Railroad Co. v. Ford*, 53 Tex. 364; *Hamilton v. N. Y. Central Railroad Co.*, 51 N. Y. 101.

4. It is well settled that where it is necessary for a traveller in going from one place to another to pass over connecting lines of railroad, it is competent for either company to contract with him for his transportation the whole distance. But a difference of opinion has existed as to whether such a contract is to be implied from the collection, by the carrier, of fare in advance for the entire

journey, without any agreement limiting its risk to its own line. It has been held that such a contract will be implied under such circumstances: *Railroad Co. v. Campbell*, 36 Ohio St. 647; *Illinois Central Railroad Co. v. Copeland*, 24 Ill. 332. And on the other hand it has been held that such a contract will not be implied from those circumstances: *Milnor v. New York, &c., Railroad Co.*, 53 N. Y. 363; *Knight v. P. & S., &c. Railroad Co.*, 56 Me. 234; *Hartman v. Eastern Railroad Co.*, 114 Mass. 44.

5. It must be regarded as settled that where a railway ticket is sold, specifying that it is good for "one first-class passage" from one place to another named thereon, the contract is an entirety and cannot be performed in parts. The contract is for a continuous passage. As expressed by Mr. Chief Justice GREEN of New Jersey, in a case decided in that state in 1854, the passenger by such a ticket "acquires the right to be carried directly from one point to the other without interruption. He acquired no right to be transported from one point to another upon the route, at different times and by different lines of conveyance, until the entire journey was accomplished. The company engaged to carry the passenger over the entire route for a stipulated price. But it was no part of their contract that they would suffer him to leave the train and to resume his seat in another train at any intervening point upon the road: *State v. Overton*, 24 N. J. Law 438. And see *Stone v. The C. & N. W. Railroad Co.*, 47 Iowa 82; *Drew v. Central Pacific Railroad Co.*, 51 Cal. 425; *McClure v. Philadelphia, &c., Railroad Co.*, 34 Md. 532, 536; *Hamilton v. N. Y. C. Railroad Co.*, 51 N. Y. 100; *Cheney v. Boston, &c., Railroad Co.*, 11 Met. 122; *Cleveland, &c., Railroad Co. v. Bartram*, 11 Ohio St. 457; *Barker v. Coffin*, 31 Barb. 556; *Terry v. Flushing, &c., Railroad Co.*, 13 Hun (N. Y.) 360; *Oil Creek, &c., Railroad Co. v.*

Clark, 72 Penn. St. 231; *Outerbridge v. Philadelphia, &c., Railroad Co.*, 1 Weekly Notes (Phila.) 11. And so in *Dietrich v. Pennsylvania Railroad Co.*, 71 Penn. St. 435, where the ticket was issued "March 11th 1867," and was stamped "good only until March 16th 1867." That the passenger purchasing such through ticket has been permitted to ride on subsequent trains without a stop-over check is inadmissible evidence, in an action brought by him against the company for ejecting him, and not allowing him to ride on a subsequent train without a stop-over check: *Stone v. Chicago Railroad Co.*, 47 Iowa 82.

The contract between the carrier and the passenger is reciprocal. As the passenger can insist on a continuous passage, having once taken passage on a train that stops at the station specified on the ticket, so the company can insist on a continuous passage, and the passenger cannot demand of the conductor as matter of right, a lay-over ticket: *Churchill v. Chicago, &c., Railroad Co.*, 67 Ill. 393. But where a passenger, upon applying to a conductor for information is told by him that he may get off at an intermediate station, and continue his journey by the next train upon the same ticket, and the passenger relying on such statement leaves the train and takes passage on the next train, the company is bound to carry him on the next train to the end of his route, and is estopped from denying the authority of the conductor to make the agreement: *Tarbell v. Northern Central Railroad Co.*, 24 Hun (N. Y.) 51. In a case in New Jersey, however, where the plaintiff, riding in the cars by virtue of a through ticket, stopped at an intermediate point, and having entered another train, claimed the right to continue his journey on the same ticket by virtue of the representations made by the conductor, but was expelled from the train, it was held that he could not recover, it appearing that only a train agent could

modify the force of the ticket: *Petrie v. Pennsylvania Railroad Co.*, 42 N. J. Law 449.

Where a passenger gave to the conductor his ticket from C. to N., but the conductor gave him no check in return, and before reaching N. there was a change of conductors, and the new conductor expelled the passenger for want of a ticket, the company was held liable in damages: *Pittsburgh, &c., Railroad Co. v. Hennigh*, 39 Ind. 509.

6. Where a railroad company operates two roads between two points on its through route, one being a part of its through route, and the other a longer route used for way trains, it is held that a passenger purchasing a through ticket is only entitled to travel over the through and most direct route. For instance one purchasing a ticket at Buffalo for Albany over the New York Central Railroad, could not leave the train at Rochester, and go around by way of Auburn, connecting with the main line at Syracuse: *Bennett v. N. Y. Central, &c., Railroad Co.*, 69 N. Y. 594.

7. A ticket issued for a passage from one specified place to another, does not entitle the holder to a passage in a direction the reverse of that indicated on the ticket. For instance a ticket issued for a passage from Portland to Boston is not good for a passage from Boston to Portland; *Keeley v. Boston, &c., Railroad Co.*, 67 Me. 163 (1878).

8. The law imposes no obligation on a railroad company to carry passengers on freight trains, nor freight on passenger trains. It only requires them to carry both, permitting them to regulate the manner in which it shall be done: *Arnold v. Ill. Cent. Railroad Co.*, 83 Ill. 273; *Chicago, &c., Railroad Co. v. Randolph*, 53 Id. 515. So that when a passenger purchases a ticket he only acquires the right to be carried according to the custom of the road; he acquires the right to be carried to the

place for which it calls, on any train that usually carries passengers to that place. He cannot insist on going on a freight train, nor on a through train not accustomed to stop at that station: *Chicago, &c., Railroad Co. v. Randolph, supra*. So the words "good on passenger trains only," printed on a ticket do not amount to an agreement that all of the passenger trains of the company will stop at the station designated on the ticket. Hence, in an action brought against the company to recover damages for carrying the holder of the ticket past the destination named on such ticket, the complaint should aver that the train on which he was so carried was one which, under the regulations of the company, should have stopped at that station: *Ohio, &c., Railroad Co. v. Swarthout*, 67 Ind. 567; *Ohio, &c., Railroad Co. v. Hatton*, 60 Id. 12.

9. The rule sometimes adopted, requiring passengers who pay on the train to pay a higher rate of fare than those who pay at the ticket office, is a lawful regulation, provided such higher rate is a reasonable one: *State v. Goold*, 53 Me. 279; *Ritter v. Philadelphia, &c., Railroad Co.*, 2 Weekly Notes Cases 382; *Chicago, &c., Railroad Co. v. Parks*, 18 Ill. 460; *Pullman Palace Car Co. v. Reed*, 75 Id. 130; *Indianapolis, &c., Railroad Co. v. Rinard*, 46 Ind. 293; *Hoffbauer v. The D., &c., Railroad Co.*, 52 Iowa 342; *Toledo, &c., Railroad Co. v. Wright*, 68 Ind. 586; *Jeffersonville, &c., Railroad Co. v. Rogers*, 28 Id. 1; *State v. Chovin*, 7 Iowa 204; *Du Laurens v. First Divis., &c.*, 15 Minn. 49; *Bland v. Southern Pacific Railroad Co.*, 55 Cal. 570. Where a railroad company requires that tickets shall be purchased at the railway station, it must furnish convenient facilities to the public for the purchase of tickets by keeping open the office a reasonable time in advance of the hour fixed by the timetables for the departure of trains. If this is not done, a party has the right to

enter the train and offer to pay for the passage, and if this is refused and he is ejected, he has a right of action against the company: *Chicago, &c., Railroad Co. v. Flagg*, 43 Ill. 364; *Illinois Central Railroad Co. v. Johnson*, 67 Id. 314; *Illinois Central Railroad Co. v. Sutton*, 42 Id. 440; *Chicago, &c., Railroad Co. v. Parks, supra*; *St. Louis, &c., Railroad Co. v. Dalby*, 19 Id. 353; *Jeffersonville, &c., Railroad Co. v. Rogers, supra*; *Paine v. Chicago, &c., Railroad Co.*, 45 Iowa 569. No right exists to eject a passenger who has paid the regular rate and refused to pay the extra fare, so long as the money is retained in the possession of the conductor. So long as the conductor keeps the money it is evidence that it was received as full fare, and the passenger may rely on it as such. The company is liable if the passenger is expelled before the money is returned, and it is no defence that the conductor returned the money after he had got the passenger off the train: *Bland v. Southern Pacific Railroad Co.*, 55 Cal. 570. But it is not the duty of the company to keep the office open as long as a delayed train may happen to stop at the station after the time established for its departure. It is held sufficient if it is kept open during such a reasonable time before the time appointed for the train to start, as that all passengers who arrive at the depot on time shall have a sufficient time to purchase a ticket and get aboard the train: *St. Louis, &c., Railroad Co. v. South*, 43 Ill. 176. In New York the Supreme Court has held that where a railroad company is authorized by law to charge additional fare to a passenger who omits to purchase a ticket before entering the cars, it is not bound to keep its ticket office open for any particular time before the departure of the train, in the absence of a statutory provision requiring it to do so: *Bordeaux v. Erie Railroad Co.*, 8 Hun 579. And where the company requires extra fares of passengers not purchasing tickets before entering the cars, and the

passenger pays the extra rate for a passage from A. to B., and on reaching B. does not leave the train but concludes to go on to C., he is again bound to pay the additional rate the same as though he entered the train at B.: *Chicago, &c., Railroad Co. v. Parks, supra*.

A railroad company has the right to adopt a rule requiring all persons, who propose taking passage on a freight train, to purchase their tickets before entering the cars, and authorizing the conductors to expel from the train all persons who have not provided themselves with tickets: *Law v. Illinois Central Railroad Co.*, 32 Iowa 534; *Lane v. East Tenn., &c., Railroad Co.*, 5 Lea (Tenn.) 124; s. c. 2 Am. & Eng. Railway Cases 278; *Illinois Central Railroad Co. v. Nelson*, 59 Ill. 110; *Toledo, &c., Railroad Co. v. Patterson*, 63 Id. 304; *Lake Shore, &c., Railroad Co. v. Greenwood*, 79 Penn. St. 373; *B. & M. Railroad Co. v. Rose*, 11 Neb. 177. But the cases hold that the public is entitled to previous notice of such a regulation.

10. It is of course within the legitimate power of a state to enact that a railway ticket shall be good for a certain specified period from the time it is issued, and that the holder of the ticket shall have the right to stop over at any of the stations along the line of the road. But such a statute is limited to and cannot have any effect outside the limits of the state enacting it. For instance, in 1871 the legislature of Maine enacted that the holder of a railway ticket should have the right to stop over at any station along the line. After the passage of this law a ticket was purchased in Portland, Maine, for a passage from that point to Montreal, Canada, and was stamped "Good only for a continuous trip within two days from date," being dated on March 3d. The holder stopped over and did not reach the Canadian line until the last of March. The conductor then refused to allow him to ride further, and put him from the train. The passenger

contended that the ticket having been purchased in Maine, the contract for carriage was a Maine contract and subject to the statute already alluded to. The court held that no extra territorial effect could be given to the statute, that to give it effect beyond the state limits would be to give force to a regulation of interstate commerce: *Carpenter v. Grand Trunk Railroad Co.*, 72 Me. 388.

11. It is settled that the state can regulate the fares which railway companies can charge for transportation of freight or passengers: *Illinois Central Railroad Co. v. People*, 95 Ill. 313; *Ruggles v. People*, 91 Id. 256; *Winona, &c., Railroad Co. v. Blake*, 94 U. S. 180; s. c. 19 Minn. 418; *Shields v. Ohio*, 95 U. S. 319; *Chicago, &c., Railroad Co. v. Iowa*, 94 Id. 155.

12. Where a railroad ticket purports on its face to be for the exclusive use of a man and his family, a son who is residing with the father, as a member of his family, is authorized to ride on the road by virtue such of ticket, notwithstanding he may be over twenty-one years of age. But if at the time the ticket was purchased, the purchaser was informed that a son over twenty-one years old would not be permitted to ride on it under the regulations of the company, such a regulation forms a part of the contract of purchase and is obligatory upon the holder or any person who attempts to ride thereon: *Chicago, &c., Railroad Co. v. Chisholm*, 79 Ill. 584.

13. It has been held that a passenger who exhibits his ticket and demands a seat need not surrender the ticket until a seat has been furnished. But when he has been furnished with a seat, he cannot refuse to surrender the ticket and offer to pay from the point where the seat was furnished: *Davis v. Kansas City, &c., Railroad Co.*, 53 Mo. 317.

14. That a conductor has no right to take up a passenger's ticket, until the last intermediate stopping place has been passed, unless he puts the passenger in

as good condition as he was in before, by giving him a check or token evidencing his rights, is asserted and with good reason: *Puñner v. Charlotte Railroad Co.*, 3 S. C. (N. S.) 580.

In *Chicago, &c., Railroad Co. v. Griffin*, 68 Ill. 503, the court declare that "there is great force in the reasoning of some of the cases that hold a passenger would not be bound to surrender his ticket before passing all intermediate stations, without receiving a check in return." But the court held that the law did not impose the obligation of delivering a check where the passenger did not demand it from the conductor. A passenger is bound to surrender his ticket when demanded by the conductor, in exchange for a conductor's check: *Northern Railroad Co. v. Puge*, 22 Barb. (N. Y.) 130.

15. Where a commutation ticket stipulated that it should only be used by the person to whom it was issued, and that if found in the hands of any other person it should be forfeited and taken up, it was held that the ticket could be properly taken from the person to whom it was issued, if it had been used by any other person with his connivance, that it could be taken up even in the hands of the person to whom it was issued: *Freidenrich v. Baltimore, &c., Railroad Co.*, 53 Md. 201.

A railroad company can require commuters to show their tickets, and in default can exact fare without any liability to repay the same: *Bennett v. Railroad Co.*, 7 Phil. 11; *Cresson v. Philadelphia, &c., Railroad Co.*, 32 Leg. Int. 363.

16. A thousand-mile ticket, which contained a stipulation "good for six months only," has been held void at the end of that time, although the thousand miles may not have all been travelled: *Lillis v. St. Louis, &c., Railroad Co.*, 64 Mo. 464; *Powell v. Pittsburgh, &c., Railroad Co.*, 25 Ohio St. 70; *Sherman v. Chicago, &c., Railroad Co.*, 40 Iowa 45. And when such

ticket stipulates that it is good for a certain period, but that if presented after that time the conductor shall take it up and demand fare, the use of the ticket a number of times in violation of this condition does not estop the company from taking up the ticket and ejecting the passenger: *Sherman v. Chicago, &c., Railroad Co.*, *supra*.

17. Where a passenger purchases an excursion ticket, not receivable on a particular train, and gets on board such train, he may be compelled to pay full fare or be expelled from the cars: *Nolan v. N. Y., &c., Railroad Co.*, 9 J. & Sp. 541.

18. And a company is under no obligation to transport a person who has purchased a ticket with counterfeit money, and such person may be ejected if the mistake is not rectified: *Memphis Railroad v. Chastine*, 54 Miss. 503.

19. Where a railroad company instructed its gateman to compel passengers to produce their tickets on leaving its station, and the plaintiff was stopped by the gateman while attempting to pass out of the station, who demanded his ticket, and also detained him, although informed he had lost his ticket, and who finally sent for a policeman, who arrested him for disorderly conduct and for refusing to pay his fare, who took him to the station house and detained him over night, it was held that the company was liable for false imprisonment, the plaintiff having been discharged the next morning on his examination before a police justice: *Lynch v. Metropolitan Elevated Railway Co.*, 24 Hun 506.

20. And it seems that where a ticket is sold to A. for a "continuous passage" from one point to another, and A. sells such ticket at an intermediate station to B., B. acquires no right to continue the journey from such intermediate station and on the same train: *Cody v. Central Pacific Railroad Co.*, 4 Sawyer 114, 118.

HENRY WADE ROGERS.

Supreme Court of Massachusetts.

SANBORN v. ROYCE.

The seizure and actual removal of specific chattels of a partnership, on an execution against one member thereof for his private debt, and the exclusion of the firm from the possession of such property, constitute a trespass for which the firm may maintain an action against the officer.

ACTION of trespass for entering the plaintiffs' premises and taking and conveying away certain articles of personal property belonging to the plaintiffs. The defendant, a constable, justified on the ground that he attached said property upon a writ in favor of one Rich and another against Packard, one of the plaintiffs. The plaintiffs were copartners in business, and the defendant knew of the fact at the time of the attachment. The court below ruled that upon the facts the plaintiffs were entitled to nominal damages at least. The defendant excepted.

The opinion of the court was delivered by

ALLEN, J.—The question presented in this case has been several times alluded to, but has never been decided in Massachusetts, though it has been the subject of much discussion and conflicting opinion elsewhere. It has been declared that the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts, and a just settlement of the account between himself and his partner: *Peck v. Fisher*, 7 Cush. 389. This doctrine is in accordance with the great body of modern decisions.

It is also declared, in *Allen v. Wells*, 22 Pick. 452, that a separate creditor can take and sell only the interest of the debtor in the partnership property, being his share upon a division of the surplus, after discharging all demands upon the copartnership. This rule also is supported by a great weight of authority.

It is rather remarkable, in view of the multitude of cases in which the question has arisen, and the conflict of opinion which has existed, that the manner in which a creditor of one member of a firm may apply that member's interest in the partnership to the payment of his debt has not been more often the subject of legislation. The rights of parties, however, in this State, as in almost all the other States of the Union, are still left to be worked out as well as possible by the courts.

There is an entire concurrence of opinion among the leading text-writers, in recent times, that courts of law cannot adequately deal with the subject : 3 Kent Com. 65, n. ; Story on Part., §§ 262, 312 ; Collyer on Part., § 830. Lindley sums up what he has to say with the remark : "The truth is that the whole of this branch of the law is in a most unsatisfactory condition, and requires to be put on an entirely new footing ;" Lindley on Part. (4th ed.) 694.

It is sufficient for the purposes of the present case to decide, as we do, that the seizure and actual removal of specific chattels of a partnership, on a writ of execution against one member thereof for his private debt, and the exclusion of the firm from the possession of its property, are trespass. The authorities in support of this proposition seem to us more in accordance with just legal principles than those which are opposed to it : *Bank v. Carrolton Railroad*, 11 Wall. 628, 629 ; *Cropper v. Coburn*, 2 Curtis C. C. 465 ; *Burnell v. Hunt*, 5 Jur. 650, by PATTESON, J. ; *Garvin v. Paul*, 47 N. H. 158 ; *Duborrow's Appeal*, 84 Penn. St. 404 ; *Haynes v. Knowles*, 36 Mich. 407 ; *Levy v. Cowan*, 27 La. An. 556.

Exceptions overruled.

Sir Nathaniel Lindley, in his valuable work on the Law of Partnership (p. *515), thus states the manner of issuing and levying an execution against a partnership for a firm debt : "If a judgment has been obtained against several persons sued jointly, the writ of execution founded on the judgment must be against all of them, and not against some or one of them only ; for the judgment does not warrant such a writ. But, although the writ of execution on a joint judgment must be joint in form, it may be levied upon all or any one or more of the persons named in it ; for each is liable to the judgment-creditor for the whole, and not for a proportionate part of the sum for which judgment is obtained. The consequence of this is that the sheriff may execute a writ issued against several partners jointly, either on their joint property, or on the separate property of any one or more of them, or both on their joint and on their respective separate properties : and so long as

there is, within the sheriff's bailiwick, any property of the partners, or any of them, a return of *nulla bona* is improper. Of course, if the judgment-creditor has had execution and satisfaction against one of the partners, he cannot afterwards go against any of the others ; but the important point to observe is, that the sheriff is not bound to levy on the goods of the firm before having recourse to the separate properties of its members, and that they cannot require the sheriff to execute the writ in one way rather than another.

As to the mode in which an execution against one member of a firm for his individual debt should be levied, there is more difficulty. It may, of course, be levied upon his individual property in the same manner as if he were not a member of a firm. The difficulty arises when its collection is attempted from the interest of the execution debtor in the partnership property.

There can be no question but that the

nature of the share of a partner is correctly described in the principal case. "What is meant by the share of a partner is his proportion of the partnership assets after they have been all realized and converted into money, and all the debts and liabilities have been paid and discharged:" Lindley on Partnership *661; *Matlock v. Matlock*, 5 Ind. 404; *Smith v. Evans*, 37 Id. 526; *Carter v. Bradley*, 58 Ill. 101; *Simpson v. Leach*, 86 Id. 286; *Hill v. Beach*, 12 N. J. Eq. 31; *Douglas v. Winslow*, 20 Me. 89; *Perry v. Holloway*, 6 La. Ann. 265; *Schalck v. Hurmon*, 6 Minn. 265; *Filley v. Phelps*, 18 Conn. 294; *Menagh v. Whitwell*, 52 N. Y. 146; *Stuts v. Bristow*, 73 Id. 264; *In re Corbett*, 5 Saw. 206; *Hull v. Clagett*, 48 Md. 223; *Conkling v. Washington University*, 2 Md. Ch. 497.

The interest of one partner in the partnership property may be attached or levied upon and sold on execution for his separate debt: *Sitler v. Walker*, 1 Freem. Ch. (Miss.) 77; *Place v. Sweetzer*, 16 Ohio 142; *Nixon v. Nash*, 12 Ohio St. 647; *James v. Stratton*, 32 Ill. 203; *Newhall v. Buckingham*, 14 Id. 405; *White v. Jones*, 38 Id. 159; *Dow v. Sayward*, 14 N. H. 9; s. c. 12 Id. 271; *Murston v. Dewberry*, 21 La. Ann. 518; *Choppin v. Wilson*, 27 Id. 444; *Saunders v. Bartlett*, 12 Heisk. 316; *Wilson v. Strobach*, 59 Ala. 488; *Weaver v. Ashcroft*, 50 Tex. 428; *Peoples' Bank v. Shryock*, 48 Md. 427. But a creditor of an individual partner has a right to sell on execution only that partner's interest in the firm property, that is, what of the partnership property belongs to the debtor partner, after paying the debts due by the firm and his own debt to the firm: Lindley on Partnership *689; *Merrill v. Rinker*, 1 Bald. 528; *Lyndon v. Gorham*, 1 Gall. 367; *White v. Dougherty*, Mart. & Yerg. 309; *McCarty v. Emlen*, 2 Yeates 190; *Knox v. Summers*, 4 Id. 477; *Knox v. Schepler*, 2 Hill (S. C.) 595; *Tappan v. Blaisdell*, 5 N. H. 190; *Gibson v. Stevens*, 7 Id. 352; *Pierce v.*

Jackson, 6 Mass. 242; *Fisk v. Herrick*, 6 Id. 271; *Nixon v. Nash*, 12 Ohio St. 647; *Place v. Sweetzer*, 16 Ohio 142; *Brewster v. Hannet*, 4 Conn. 540; *Witter v. Richards*, 10 Id. 37; *Filley v. Phelps*, 18 Id. 294; *Jones v. Thompson*, 12 Cal. 191; *Menagh v. Whitwell*, 52 N. Y. 146; *Williams v. Gage*, 49 Miss. 777; *Hacker v. Johnson*, 66 Me. 21. It is not, according to the better opinion, an interest in any particular piece of property that is liable for a partner's separate debts, but his interest in the firm assets after the settlement of the firm accounts. See *Atwood v. Meredith*, 37 Miss. 635, and the cases cited above. No specific asset, credit or property of the partnership is, according to the better opinion, liable to seizure under attachment execution or garnishee process against one of the partners: *Lery v. Cowan*, 27 La. Ann. 556; *Marston v. Dewberry*, 21 Id. 518; *Towne v. Leach*, 32 Vt. 747; *Peoples' Bank v. Shryock*, 48 Md. 427; *Lyndon v. Gorham*, 1 Gall. 367; *Bulfinch v. Winchenbach*, 3 Allen 161; *Siceet v. Read*, 12 R. I. 121; *Cook v. Arthur*, 11 Ired. 407; *Clagett v. Kilbourne*, 1 Black 346; *Gibson v. Stevens*, 7 N. H. 352; *Fisk v. Herrick*, 6 Mass. 271; *Atwood v. Meredith*, 37 Miss. 635; *Garvin v. Paul*, 47 N. H. 158. In Maine, however, it has been held that the debtor of a firm can be held as trustee of one of the partners in an action in which that partner is principal defendant, if neither a creditor of the firm nor any other partner interpose: *Thompson v. Lewis*, 34 Me. 167. It has also been held in that state that a creditor of one of the partners may attach such partner's interest in a specific portion of a stock of goods belonging to the firm, and is not required in order to render the attachment regular to take the partner's interest in the entire stock of goods: *Fogg v. Lawry*, 68 Me. 78. See also *Carillon v. Thomas*, 6 Mo. App. 574. See, however, *Hacker v. Johnson*, 66 Me. 21.

If the sheriff sells and delivers not the share of the execution debtor, but the goods themselves, he is, according to some authorities, not liable in trover, but is accountable to the solvent partners for so much of the proceeds of the sale as is proportioned to their share in the partnership: *Lind. on Part.* *690; *Mayhew v. Herrick*, 7 C. B. 229; *White v. Woodward*, 8 B. Mon. 484. According to other authorities, however, and as it seems, according to the better opinion, a sheriff cannot, upon a demand against one partner for his private debt, seize the goods of the partnership and exclude the other partners from the possession; and if he does, he is guilty of a trespass and is liable in trover to another partner; and the plaintiff in such case, it is held, is entitled to recover his undivided share in the property sold, without regard to the state of the partnership accounts. See *Walsh v. Adams*, 3 Den. 125; *Spalding v. Black*, 22 Kans. 55; *Atkins v. Saxton*, 77 N. Y. 195. See, also, cases cited by the court in the principal case.

As to how an execution against one partner for his individual debt should be levied upon his share in the firm, *Lindley*, in his work on *Part.* *689, after stating the former practice, says that "it was finally settled, in conformity with the older cases, that the sheriff's duty was, and it still is, to seize the whole of the partnership effects, or if so much of them as may be requisite, and to sell the undivided share of the debtor partner therein, without reference to the state of the accounts as between him and his co-partners. The sheriff, having seized the property of the firm, proceeds to sell the interest of the judgment debtor, and to assign the same to the purchaser. The bill of sale recites that the sheriff has entered upon, and taken possession of, all the share and interest of A. B. (the judgment debtor) as partner with one C. D., of and in all the book debts, materials, tools, implements, goods, chattels, effects and stock in trade used in

the said business, which has been valued at —*l.*; and the sheriff then assigns all the share, right and interest of him, the said A. B., of and in all and every the debts, chattels and effects so seized under and by virtue of the writ of *fi. fa.*, and held by the said A. B. in partnership or joint-tenancy with the said C. D., to have and to hold, receive and take, the said share, furniture, debts, goods, chattels and effects thereby bargained and sold, or intended so to be, unto the said F. F. (the purchaser), his heirs, executors, administrators and assigns, as his and their own proper debts, goods and chattels." The purchaser at the sale under an execution against one partner of his interest in the partnership property, does not acquire any title to the property, entitling him to a delivery of it, nor if it be a debt entitling him to collect it. The title to the property or the debt still remains in the firm, and the purchaser acquires only a right to an account: *Lind. on Part.* *690; *Barrett v. McKenzie*, 24 Minn. 20; *Lathrop v. Wightman*, 41 Penn. St. 297; *Deal v. Bogue*, 20 Id. 228; *Reinheimer v. Hemingway*, 35 Id. 432; *Smith v. Emerson*, 43 Id. 456; *Wilson v. Strobach*, 59 Ala. 488; *Siler v. Walker*, 1 Freem. Ch. (Miss.) 77; *Andrews v. Keith*, 34 Ala. 722. See, however, *Atkins v. Saxton*, 77 N. Y. 195, per *RAPAJO, J.* A suit in equity is, therefore, necessary in order that the partnership accounts may be taken, and the partnership property duly applied; *Lind. on Part.* *690. The bill for an account may be filed after the seizure and before the sale, or the sale may be made and the purchaser left to file a bill to ascertain his interest: *Broadnax v. Thomason*, 1 La. Ann. 383; *Nixon v. Nash*, 12 Ohio St. 647. See also *Knight v. Oyden*, 2 Tenn. Ch. 473. The judgment debtor may, as it seems, elect to have the account taken before the sale by applying to a court of equity therefor: *Hacker v. Johnson*, 66 Me. 21, 25.

As to the decision in the principal

case, it will be apparent, we think, from it is correct both upon principle and an examination of the authorities cited authority.
by the court and those in this note, that

M. D. EWELL.

Chicago.

Supreme Court of Arkansas.

STATE v. GRIGSBY *ET UX.*

Parents are intrusted with the custody of their children on the presumption that the latter will be properly taken care of, and when it is found that the parents are guilty of gross neglect, cruelty or conduct injurious to the morals or interests of the children a court of chancery will interfere and appoint a suitable guardian.

This jurisdiction of the courts of chancery is not taken away by a like power conferred by statute on the probate courts.

The better practice is to bring the bill in the name of the infant by its next friend, but such bill ought not to be dismissed because brought in the name of the state.

APPEAL from Scott Circuit Court in Chancery.

This was a bill in equity in the name of the State against James Grigsby and Emma, his wife, alleging in substance that the defendant James, being the father of a child now about six years of age, intermarried with the defendant Emma: that defendants were able to properly provide for the child but that the defendant Emma, with the consent of the defendant James, subjected it to cruel and inhuman treatment, inflicting excessive chastisement, depriving it of food and drink, and in various ways, specifically set forth in the bill, torturing it to such an extent as to endanger its life; that several persons had offered to give it a comfortable home but that defendants refused to allow them to do so. The bill prayed that a guardian might be appointed, and that pending the suit defendants might be compelled to deliver the child to some suitable person. The court below appointed a custodian of the child and enjoined defendants from interference with his possession. At the next term defendant demurred to the bill on the grounds, 1st, of defect of parties: 2d, of want of jurisdiction, and, 3d, that the statements of the bill were not sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the bill. Plaintiff appealed.

Clendenning & Sandels, for the State.

The opinion of the court was delivered by

ENGLISH, C. J.—The jurisdiction of the court of chancery

extends to the care of the person of the infant, so far as necessary for his protection and education, and as to the care of the property of the infant, for its due management and preservation and proper application for his maintenance. It is upon the former ground, principally, that is to say, for the due protection and education of the infant, that the court interferes with the ordinary rights of parents, as guardians by nature, or by nurture, in regard to the custody and care of their children. For, although, in general, parents are intrusted with the custody of the persons, and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature, morals and religion, and that they will be treated with kindness and affection. But whenever this presumption is removed: whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, or that he professes atheistical or irreligious principles, or that his domestic associations are such as tend to the corruption and contamination of his children, or that he otherwise acts in a manner injurious to the morals or interests of his children—in every such case, the court of chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them and superintend their education. But it is only in cases of gross misconduct that parents' rights are interfered with: 2 Story's Eq. Juris., 20th ed., sect. 1341.

The jurisdiction thus asserted, to remove infant children from the custody of their parents, and to superintend their education and maintenance, is admitted to be of extreme delicacy, and of no inconsiderable embarrassment and responsibility. But it is nevertheless a jurisdiction which seems indispensable to the sound morals, the good order, and the just protection of a civilized society. On a recent occasion, after it had been acted upon for one hundred and fifty years, it was attempted to be brought into question, and was resisted, as unfounded in the true principles of English jurisprudence. It was, however, confirmed by the House of Lords, with entire unanimity, and on that occasion was sustained by a weight of authority and reasoning rarely equalled: Id., sect. 1342, and note.

The jurisdiction of chancery to appoint a guardian, and if neces-

sary for that purpose, to interfere between a father and his children, is undoubted, and has been settled by the highest authority in England, and by many cases in this country. Thus, where the habits and mode of life of the father, or his treatment of his child, are such as to affect injuriously the child's health or morals, or endanger his property, the custody will be committed to a person to act as guardian. Bispham's Equity, 486 and note.

The general theory upon which chancery assumes jurisdiction over the persons and estates of minors is, that, by proper proceedings, the infant has been constituted a ward of court. Id. 484.

As to the manner in which a minor may be appointed a ward of court, it is not necessary that there should be any suit actually pending or bill filed; the object may be attained by petition: Id. 485.

In England the prerogative of the crown as *parens patriæ* is exercised by the court of chancery. In this country the State takes the place of the King, and protects infants through chancery: Id. 488.

In *Cowls v. Cowls*, 3 Gilman (Ill.) 435, it was held that a court of chancery is vested with a broad and comprehensive jurisdiction over the persons and property of infants, and their parents who are bound for their protection and maintenance, and will take such action in relation to the charge of their persons, or the management of their property, as circumstances may require. That where infants are taken from the custody of the father by a court of chancery, and have no property of their own, the father being bound for their support, may be required by order of court to contribute to their maintenance, the court itself, or through a master, inquiring into his condition and circumstances.

In *McCord v. Ochiltree*, 8 Blackf. 15, it was said that the necessity for the existence of a power to the protection of minors, was obvious, and would be implied from a general legislative or constitutional grant of chancery powers.

In *Maguire v. Maguire*, 7 Dana 181, the court, incidentally remarked, that the protection of infants from brutal treatment by their parents, formed a part of the original jurisdiction of chancery, and as such might be exercised in this country as well as in England.

In the *State v. Stigall*, 2 Zabriskie's Rep. 286, the court cited and relied upon 2 Story's Equity, sect. 1341, quoted above, as sustaining the same proposition.

There are many cases cited in *Leading Cases in Equity, White & Tudor*, vol. 2, part 2, 4 Am. ed., by J. I. Clark Hare, p. 1847, sustaining the same proposition.

By statute, Gantt's Dig., sect. 3036, the probate court may appoint a guardian for a minor, where the parents are adjudged incompetent or unfit for the duties of guardian; but this does not interfere with the jurisdiction of a court of chancery to take from the control of the father, the natural guardian, an abused and ill-treated infant, and make it the ward of court by placing it in the custody and care of some competent and humane person, to be appointed by the court.

The bill or petition, in this case, whatever it may be called, discloses a tale of horror, shocking to humanity, and no doubt, presented a subject-matter within the jurisdiction of the court below, sitting in chambers. See *Bowles v. Dixon*, 32 Ark. 96.

On what particular ground the court sustained the demurrer to the bill does not appear, and appellees are not represented by counsel here.

If the court was of the opinion that the bill was improperly brought in the name of the State, instead of in the name of the abused infant, by some person as its next friend, which is no doubt the usual and better practice, the bill, for such informality, should not have been dismissed. Mr. Little and Mr. Sanders were no doubt prompted by motives of humanity in bringing the matter before the court, and might, on suggestion of the court, have assumed, by an amendment of the bill, the attitude of its next friend, or one of them might have done so, or if both had declined, any other suitable person might have been substituted.

At the time the demurrer was sustained the court not only had jurisdiction of the subject-matter brought to its notice by the bill, but of the defendants who had entered their appearance, and the child had been placed in the custody of a person to take care of it, pending the suit, and until the further order of the court.

To dismiss the bill for mere mistake in making the state a formal plaintiff, on demurrer, without inquiry into the truth of the grave charges made against the parents of the child, and permit it again to be restored to them by the interlocutory custodian, was an error for which the decree of dismissal must be reversed and the cause remanded for further proceedings.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF GEORGIA.²SUPREME COURT OF IOWA.³SUPREME JUDICIAL COURT OF MASSACHUSETTS.⁴NEW JERSEY PREROGATIVE COURT.⁵SUPREME COURT OF RHODE ISLAND.⁶ADMIRALTY. See *Attachment*; *Errors and Appeals*.APPLICATION OF PAYMENTS. See *Limitations*, *Statute of*.

ATTACHMENT.

Wages of Seamen—Payment under Process in Admiralty.—The owners of a coasting vessel who, after having been summoned as trustees in foreign attachment of a seaman, are compelled by subsequent process from a court of admiralty upon a libel filed by him against the vessel, and by the judgment of that court in his favor, after disclosure of all the facts relating to the trustee process, to pay to him the amount of his wages, will not be charged as trustees for the same sum; *Eddy v. O'Hara*, 132 Mass.

Quære, whether the wages of a seaman on a coasting voyage are subject to attachment by the trustee process: *Id.*

BANKRUPTCY.

Continuation of Suit by Bankrupt—Assignee not a Necessary Party.—It is no defence to an action that since its commencement the plaintiff has been adjudicated a bankrupt and an assignee appointed. It is not necessary that the assignee should make himself a party to the record, and if, after notice, he permits the suit to go on, in the name of the bankrupt, he is bound by the judgment, and the defendant is protected against any claim on his part: *Thatcher v. Rockwell*, S. C. U. S., Oct. Term, 1881.

Promise to Pay Debt Barred by Discharge.—Where a bankrupt, after the adjudication of bankruptcy and before his discharge, makes an express new promise to pay an original debt, such promise will be binding upon him after his discharge: *Knapp v. Hoyt*, 57 Iowa.

BILLS AND NOTES.

Note fraudulently procured—Defence against Endorser—Usually

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will be reported in 15 Otto.

² From J. H. Lumpkin, Esq., Reporter. The cases will probably appear in 66 Georgia Reports.

³ From B. W. Hight, Reporter; to appear in 57 Iowa Reports.

⁴ From John Lathrop, Esq., Reporter; to appear in 132 Mass. Reports.

⁵ From Hon. John H. Stewart, Reporter; to appear in 35 N. J. Eq. Reports.

⁶ From Arnold Green, Esq., Reporter, to appear in 13 Rhode Island Reports.

when the maker of a negotiable promissory note is not allowed to avail himself as against third parties holding the note, of defences valid against the payee, it is because negligence is imputable to the maker in the inception of the note. That a third party holds a negotiable note for a valuable consideration will not, of itself, in an action against the maker, deprive such maker of defences valid against the payee. Hence, when A. made a negotiable promissory note to B., which was fraudulently procured by B. and no negligence was imputable to A., and suit was brought on the note against A. by C., a purchaser for valuable consideration, but it did not appear that C. bought the note in the usual course of business or for its full face value, *Held*, that A. was entitled against C. to use the defences which he could have employed against B.: *Mil-lard v. Barton*, 13 R. I.

CONTEMPT.

Sheriff—Necessity of Rule to show cause.—After a rule absolute against a sheriff has been obtained, before he can be attached for contempt, a rule *nisi* calling upon him to show cause why he should not be so attached must be sued out and served on him: *Mize v. Barsden*, 66 Ga.

Where a rule *nisi* against a sheriff was sued out, calling on him to show cause why he should not pay over certain funds alleged to be in his hands at the time such rule was made absolute, the court could not, without more, order that in default of payment the sheriff should be attached for contempt: *Id.*

CONTRACT.

Services by Relative—Evidence.—On the issue whether services were rendered gratuitously by a son-in-law to his father-in-law, there was evidence that the parties lived together on the father-in-law's land; that the father-in-law said he expected to live there all his days; that the land was to be his daughter's when he died; and that the father-in-law intended to pay his way. *Held*, that this evidence would warrant a verdict in favor of the son-in-law: *James v. Cummings*, 132 Mass.

COSTS. See *Will*.

CRIMINAL LAW. See *Pledge*.

Alibi—Burden of Proof.—It is now the settled law of this State that where, in a criminal case, the defence of an alibi is relied upon, the burden of proof is on the defendant to establish such defence by a preponderance of the evidence: *State v. Hamilton*, 57 Iowa.

Per ADAMS, J., dissenting.—If the evidence to establish an alibi is such as to raise a reasonable doubt of the defendant's guilt, the jury would be justified in acquitting: *Id*

Evidence—Report made at the Inquest.—At the trial of an indictment for manslaughter, a witness for the defendant was allowed, in answer to a question put by the government, to refresh his memory from a report made by him of the defendant's statements at the inquest; and the defendant thereupon, without putting any question to the witness, asked to have so much of the report as related to the inquiry of the government read to the jury. The judge excluded it. *Held*, that the defendant had no ground of exception: *Commonwealth v. Jeffs*, 132 Mass.

Possession of Stolen Property—Presumption.—The recent possession of stolen property will authorize a conviction, unless the presumption of guilt arising therefrom is overcome by other facts; and it is immaterial whether it be termed a presumption of law, or a presumption of fact, as both are identical in meaning: *The State v. Kelly*, 57 Iowa.

Where the instruction stated that the presumption arising from the recent possession of stolen goods was one of law, but left to the jury the power to say whether such a presumption warranted a verdict of guilty, the defendant was not prejudiced by calling it a presumption of law: *The State v. Richart*, 57 Iowa.

The defendant can only be required to introduce evidence which creates a reasonable doubt whether he honestly came into the possession of stolen goods. An instruction that he must overcome the presumption arising from such possession by a preponderance of evidence is erroneous: *Id.*

DAMAGES.

Stipulated Sum payable in case of Breach—When Liquidated Damages.—Whether a sum agreed upon by parties to a contract as the measure of damages shall be considered as liquidated damages, or only as a penalty, will depend upon the intent of the parties and the peculiar circumstances of the subject-matter of the contract. If the damages must necessarily be wholly uncertain and incapable of estimation, the party failing to perform will be held to pay the amount as liquidated damages: *Newman v. Wolfson*, 66 Ga.

The keeper of a saloon in the city of Columbus by written contract, for the sum of \$1456.15, sold his stock of goods, bar-room fixtures, &c., together with the good will of the business to another, and covenanted not to engage in the same or a like business in that city for a period of five years, and the vendor bound himself to the purchaser, "his executors, &c., in the sum of \$2000 as liquidated damages for the faithful performance of this his promise." The vendor opened a bar room shortly afterwards in the city. *Held*, that the amount stated in the contract is to be taken as liquidated damages and not as a mere penalty; nor is the contract unreasonable: *Id.*

DOMICILE.

Absence in Europe—Intention to return to new Domicile—Taxation.—A person, having his domicile in Boston, left that city in 1876 with his family to reside in Europe for an indefinite length of time, with the fixed purpose never to return to Boston as a place of residence, and to make some place other than Boston his residence when he should return; and, while in Europe, before May 1st 1877, fixed upon a place of residence in another state, but remained in Europe until 1879. *Held*, that he retained his domicile in Boston for the purposes of taxation on May 1st 1877: *Borland v. City of Boston*, 132 Mass.

EASEMENT.

Abandonment of.—An easement may be lost by cesser of use for twenty years or by renunciation or abandonment as shown by decisive acts. Hence when a way had been laid out for the common use of lots
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bounded on it and A., the owner of one of these lots, had appropriated to his own use the part of the way opposite his lot: *Held*, that A. had abandoned his easement in the way and could not maintain an action against the owner of another of the lots for obstructing a portion of the way: *Steere v. Tiffany*, 13 R. I.

The character of an easement created by implication or estoppel is determined by the circumstances in which the easement was created. Hence when it was clear that a way was to be used in common as a whole and a part of it was appropriated by an owner of one of the dominant tenements, *Held* that the act of appropriation was an abandonment of the easement in the whole way: *Id.*

EQUITY.

Proceedings against Equitable Assets—Absconding Debtor.—A. absconded, in debt, leaving no legal assets which could be attached, so that a judgment at law could be not obtained against him; *Held*, that his creditors could at once proceed in equity against his equitable assets to satisfy their legal claims. *Held further*, that if such claims appeared specially fit for legal cognisance or specially unfit for equitable, the Equity Court would submit them to a jury on issues framed for that purpose: *Merchant National Bank v. Puine*, 13 R. I.

The rule requiring the exhaustion of legal remedies before chancery will take jurisdiction of a legal debt rests on two reasons: first that a judgment and execution returned unsatisfied are the best evidences of the debt: second that legal tribunals should adjudicate legal claims. The first reason fails when legal process is impossible; the second is satisfied by a jury trial of issues from chancery: *Id.*

ERRORS AND APPEALS.

Admiralty—Appeals from District to Circuit Courts—Procedure—Cross Appeals to Supreme Court—An appeal in admiralty from a District to a Circuit Court must be to the term of the Circuit Court held next after the decree, and it must be made while the District Court is sitting, or within the time required by the general rules or a special order. These requirements are jurisdictional. All other rules are mere matters of procedure and may be dispensed with by the court. Hence, it is not a valid objection to an appeal that the District Court allowed it without any writing, notwithstanding a rule of that court required it to be in writing: *Winslow v. Wilcox*, S. C. U. S., October Term, 1881.

A provision in the rule of the District Court that the clerk should prepare and deliver to the Circuit Court the appeal and record in twenty days cannot prevent the Circuit Court from entertaining the cause if, for any reason, this is not done: *Id.*

A cross appeal to the Supreme Court must be prosecuted like other appeals, and the appellant must comply with the rules as if no other appeal had been taken in the cause: *Id.*

Case Appealed from District to Circuit Court—Certificate of Division—Revenue Case.—At a hearing in the Circuit Court of an appeal from the District Court, the district judge who rendered the judgment appealed from cannot, under sect. 614 of the Revised Statutes, give a vote even by consent of parties when another judge is present, and the case cannot be brought to the Supreme Court upon a certificate of division of opinion

between him and the other judge : *United States v Emholt*, S. C. U. S., October Term, 1881.

An information for a forfeiture under the internal revenue laws cannot be brought from the Circuit to the Supreme Court : *Id.*

EVIDENCE. See *Criminal Law* ; *Witness*.

Competency of Witness—Religious Belief.—Upon cross-examination a witness was allowed to be questioned as to his belief in a Supreme Being and in a state of future rewards and punishments. *Held*, that the want of such religious belief could not be established from the examination of the witness upon the stand. It must be shown, if at all, by his previous declarations voluntarily made. He cannot be required to divulge his religious opinions : *Searcy v. Miller*, 57 Iowa.

Office Paper—Fi. fa.—A *fi. fa.* is not an office paper which must be kept on file in the court where it originates. The original may be taken out of court and used in evidence. It is the best evidence of the right to seize and sell, in contests under sheriffs' sales ; if lost or destroyed, a copy of it from the records may be used : *Thomas v. Parker*, 66 Ga.

An original *fi. fa.* from the Circuit Court of the United States will be recognised by the state courts without other than intrinsic proof, and is admissible in a contest arising thereunder : *Id.*

EXECUTORS AND ADMINISTRATORS.

When chargeable with Interest.—An administrator converted dividend-paying bank stock of the estate into money, and with it paid off a mortgage on lands in which he had an interest as heir of the intestate. On exceptions to his account credit for that payment was disallowed. *Held*, that he was chargeable with interest at the legal rate on that amount from the date of the payment, including the time during which litigation on the exceptions continued : *Mount v. Van Ness*, 35 N. J. Eq.

Mortgage of Executor held by Testator—Failure to Record.—An executor gave his testator, during the latter's lifetime, a mortgage for moneys loaned, but owing to the testator's illiteracy, the mortgage was never registered. *Held*, that the residuary legatees might require him to give security because he neglected to have the mortgage registered after it came into his hands as part of the estate, and also because he claimed certain credits for payments thereon, which appeared to be false : *Bird v. Wiggins*, 35 N. J. Eq.

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FRAUDS, STATUTE OF.

Parol Trust.—Where the conveyance in trust was made voluntarily, without solicitation or undue influence, and no fraud is shown prior to or contemporaneous with the execution of the deed, but consists in denying and repudiating the agreement to reconvey, it will not remove the case from the operation of the Statute of Frauds : *McClain v. McClain*, 57 Iowa.

GUARDIAN AND WARD.

Maintenance of Ward—Surety—Laches.—A ward, whose estate was small, lived with his father, who was the guardian. The father never, during his lifetime, made any charge against the ward for his maintenance. *Held*, that sureties of the guardian cannot obtain an allowance therefor in a suit on their bond: *In re John L. Walling, Guardian*, 35 N. J. Eq.

A guardian was appointed in 1860; his youngest ward came of age in 1871, and the guardian became insolvent in 1872 or 1873. *Held*, that the ward's omission to sue the surety or his administrator, until 1880, did not prevent his recovery: *Id.*

HABEAS CORPUS.

Jurisdiction—Return.—The allegation of the petition for a writ of *habeas corpus*, that minor children were concealed by the respondent in Polk or Dallas counties, was sufficient to give the court of Polk county jurisdiction, and authorized the issuance of the writ: and the fact set up in the answer, that the children were in a foreign jurisdiction did not deprive the court of jurisdiction, or excuse the respondent for not producing the children in court in obedience to the writ: *Rivers v. Mitchell*, 57 Iowa.

The return to the writ of *habeas corpus*, should have shown that the respondent did not have the power to produce the children in court, in obedience to the writ: *Id.*

Prisoner sentenced by Court Martial—United States Supreme Court.—Even if the United States Supreme Court can issue a writ of *habeas corpus* for a prisoner under sentence by a court martial (a question not decided) there can be no discharge under such writ if the court martial had jurisdiction to try the offender, and the sentence was one which the court could under the law pronounce: *Ex parte Mason*, S. C. U. S., Oct. Term, 1881.

HOMESTEAD.

Lien on Crop for Supplies—When superior to Homestead Right.—Where a factor furnishes supplies and provisions to a planter to make a crop and takes a lien on the growing crop therefor, such advances are in the nature of purchase-money or materials furnished for the crop so raised, and the landlord's debt therefor is superior to the homestead right of the debtor's wife: *Cook v. Roberts*, 66 Ga.

HUSBAND AND WIFE.

Loan by Wife to Husband—Payment for Joint Benefit.—A widow may reclaim from her husband's estate moneys of her separate estate which she loaned him during his lifetime, and which he applied to the payment of a mortgage on lands, the title to which stood in the names of her and her husband, as husband and wife: *Greiner v. Greiner*, 35 N. J. Eq.

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LARCENY. See *Pledge*.

LIMITATIONS, STATUTE OF.

Application of Payments—Proceeds of Collateral.—In an action upon four promissory notes, the defence to three of which was the statute of limitations, it appeared that, upon payment of the notes being demanded, the defendant assigned to the plaintiff certain choses in action, the proceeds of which were to be applied, as far as such moneys went, upon the defendant's indebtedness to him upon the notes, and that there was no agreement, or understanding between the parties, and no direction by the defendant, as to how any money received by the plaintiff through said assignments should be specially applied. *Held*, that the money received by the plaintiff under the assignments should be applied as a partial payment upon each of the notes : and that the whole debt was taken out of the statute of limitations : *Taylor v. Foster*, 132 Mass.

LIS PENDENS.

Constructive Notice.—A party purchasing land will be charged with notice of the pendency of an action affecting the same, from the time the petition is filed ; and the facts that the action was not properly indexed in the appearance docket, and that the notice was not served until after the purchase, are immaterial : *Haverly v. Alcott*, 57 Iowa.

MALICIOUS PROSECUTION.

Guilty Plaintiff cannot Recover—Previous Verdict in his favor not conclusive—Advice of Counsel.—The action for malicious prosecution is given in favor of an innocent plaintiff, not of a guilty one. Hence, when A. brought trover against B. and B., after a verdict in his favor, sued A. for malicious prosecution, *Held*, that evidence of facts tending to show B.'s guilt, which facts were not known to A. when he brought the action of trover, although inadmissible to show probable cause on the part of A., should be admitted as bearing on the actual guilt of B. : *Newton v. Weaver*, 13 R. I.

In the suit for malicious prosecution A. requested the presiding judge to charge the jury that if in the action of trover the question of fact whether B. had been guilty of acts amounting to trover and conversion was submitted to the jury and deliberated upon, then a verdict for the defendant should be given in the suit for malicious prosecution. *Held*, that this request was properly refused : *Id.*

A plaintiff who, after consulting legal counsel in good standing and fully disclosing the facts of his case within his knowledge, brings an action relying in good faith on the advice of such counsel, is not liable in a suit for malicious prosecution for bringing such action : *Id.*

Proof of Guilt—Damages.—In an action for malicious prosecution, if the defendant can satisfy the jury that the plaintiff, notwithstanding his acquittal, was in fact guilty, no recovery can be had ; and in view of the evidence of actual guilt in this case, the instruction as to belief and probable cause should have been so qualified : *Parkhurst v. Masteller*, 57 Iowa.

In an action for malicious prosecution, mental suffering, not arising directly from bodily suffering, and injury to the feelings, constitute elements of actual or compensatory damages : *Id.*

In addition to damages for injury to the feelings, exemplary damages may be allowed in a proper case, strictly by way of punishment : *Id.*

MORTGAGE.

Fraudulent as to Third Party—Validity as between Parties.—A. executed and delivered to B. a mortgage of certain specified chattels with covenants of ownership and warranty. Among the enumerated chattels were some which A. and B. both knew belonged to a third party. After condition broken B. demanded the chattels, and on A.'s refusal to deliver them brought trover against A. *Held*, that A. was estopped by his covenants from denying his ownership of the chattels. *Held, further*, that as the action in trover affected only A., and as the mortgage was valid between A. and B., the fact that A. and B. were both cognisant of and participants in the fraud actual or attempted on the third party was immaterial: *Harvey v. Harvey*, 13 R. I.

Agreement for Return of Property.—A litigant desiring the services of an attorney, gave him the following instrument in consideration of services to be rendered in a pending case: "Received of J. J. Findley and W. F. Findley \$25 in full payment for one black cow, about six years old, and one calf now belonging to said cow, about two months old, said cow being the cow I bought of Bob Reed. It is agreed by the purchasers of the above property and Austin Hughes, the signer of this receipt, that said Hughes shall retain the property and use the same from this date to the first day of October next, at which time should the said Hughes pay to said Findleys \$25, then the property to remain said Hughes's but if the money be not paid that day the property to be delivered up to the said Findleys" *Held*, that this paper was a mortgage, and did not pass title to the property described therein: *Findley v. Deal*, 66 Ga.

Purchase of by Owner of Land—When kept Alive.—A mortgage lien purchased by the owner of the equity of redemption will, in the absence of a contrary intention manifest to the court, be kept alive in equity for the purchaser's protection against an intervening encumbrance and will not merge: the rule being the same whether the purchaser takes an assignment of the whole mortgage lien or a release or quitclaim of the mortgagee's interest in the estate held by the purchaser: *Duffy v. McGuiness*, 13 R. I.

MUNICIPAL BONDS.

Signature of Judge de facto but not de jure—Validity.—County bonds issued by a de facto county court, sealed with the seal of the court, and signed by the de facto president, cannot be impeached in the hands of an innocent holder by showing that the acting president was not de jure one of the justices of the court: *Ralls Co. v. Douglass*, S. C. U. S., Oct. Term, 1881.

PLEDGE.

Larceny of the Thing Pledged by the Pledgor.—Property was pledged as security for a debt. Afterward the pledgor obtained possession thereof for a special purpose, with the consent of the pledgee, and thereupon took the property out of the county, and there was evidence tending to show that the pledgor obtained possession of the thing pledged with the felonious design of depriving the pledgee of his security. *Held*, that the pledgee had a special property in the thing

pledged; that if the pledgor obtained possession of the thing pledged by deception and false pretence, the pledgee could not be deemed to have released his lien or special property therein; that where the taking was with the felonious design to deprive the pledgee of his security, the pledgor would be guilty of larceny of the thing pledged: *Bruley v. Rose*, 57 Iowa.

Receipted Bill of Chattels as Security for Debt—Possession by Pledgor—Subsequent Conversion by Pledgee.—A receipted bill of parcels of chattels, purporting on its face to be as security for a debt, is a pledge and not a mortgage; and if the pledgee, after receiving possession of the chattels, permits the pledgor to resume possession of them and to hold them until his death, he cannot by then taking possession of them, defeat the right of the administrator to maintain against him an action for their conversion: *Thompson v. Dolliver*, 132 Mass.

SHERIFF. See *Contempt*.

TAXATION. See *Domicile*.

UNDUE INFLUENCE. See *Will*.

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VENDOR AND VENDEE.

Part Payment—Purchase of Title of Vendor at Sheriff's Sale.—Where a vendor of land in possession thereof under contract of purchase from his vendor, but with only part of the purchase-money paid, bought the property to protect himself at a sheriff's sale under a *fi. fa.* against his vendor, he was not thereby relieved from complying with his contract of purchase, but could set off the amount so expended by him against the balance of purchase-money due the vendor.—*English v. English*, 66 Geo.

WARRANTY.

Covenant of—Outstanding Equitable Title.—The mere fact of the existence of an equitable title in a third person, cannot be set up in an action of law, as a breach of any of the usual covenants in a deed conveying the legal title: *Wilson v. Irish*, 57 Iowa.

Where the covenantee takes, or has power to take, possession under his deed, he cannot complain of an outstanding equitable title, until it is successfully asserted: *Id*

WATERS AND WATERCOURSES

Right of Riparian Owner—Injunction—Reservoirs.—The right of a riparian owner to have the water of the stream flow through or by his land in its natural purity and without appreciable pollution caused by owners above him, is well settled, is a part of his property, and will be protected by injunction. Nor is the right modified by the fact that the flow of the stream has been increased by reservoirs built along its upper course: *Silver Spring Bleaching and Dyeing Co. v. The Wanskuck Co.*, 13 R. I.

Right to take Driftwood—Wreck floated Ashore not Within.—By a deed of partition A. received the right to have to himself and his heirs

"exclusively all the sea manure and drift stuff which lands on the West Shore," also to have the right of tipping the same and carting away at their pleasure by a road or way leading on the bank of said West Shore clear of the gullies." *Held*, that this right did not embrace goods floated ashore from a wrecked vessel so as to entitle A. to the salvage as against the riparian owner. *Held, further*, that the right was confined to such stuff as A. could collect and legally appropriate, not such as A. must hold for or deliver to a known owner: *Watson v. Knowles*, 13 R. I.

WILL.

Costs—Services of Detective.—A claim for services rendered by a detective employed by the counsel of the principal legatee, such services being valuable in establishing the will, may be allowed and paid out of the estate: *In re Will of Joseph L. Lewis*, 35 N. J. Eq.

Undue Influence—Evidence.—That the draughtsman of a will was made the executor, and his relations received a considerable portion of the estate devised, does not raise any presumption of undue influence over the testator, which must be rebutted by proof: *Carter v. Dixon*, 66 Ga.

A testator may have his preferences, dislikes and animosities toward his heirs and may be guided by them in the disposition of his estate; still if he is competent in mind, and makes a will freely and voluntarily, these conditions of mind will not *per se* destroy his testamentary capacity. And though prejudices may be unfounded, still if they are not used to coerce and control his will or impose a fraud upon him, they will not avoid his will: *Id.*

Where the only relevancy of a difficulty is to show the state of feeling between parties, the fact of the difficulty may be admissible, but its particulars are not: *Id.*

Undue influence over a testator must be satisfactorily established by other evidence than his declarations, although they are admissible to show the extent and effect of such influence: *Rusling v. Rusling*, 35 N. J. Eq.

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Expert—Who is—How Competency Decided.—Whether a witness is qualified to testify as an expert is a preliminary question for the presiding judge, whose decision is conclusive, unless it appears upon the evidence to have been erroneous, or to have been founded upon some error in law: *Perkins v. Stickney*, 132 Mass.

A treasurer of a mill corporation, whose only knowledge of the quality of the coal burned in his mill is derived from the weekly reports of his engineer, is not qualified as an expert to testify as to such quality, although he has bought all the coal used in his mill for several years: *Id.*

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3. Married woman's acknowledgment duly certified is *prima facie* but not conclusive evidence against her, except as to a *bona fide* vendee without notice as to whom she is estopped to deny an acknowledgment actually made. *Holt v. Moore*, 342.
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1. Has jurisdiction of suit by one who, expecting a consignment, boards a vessel upon her arrival and is injured by the fall of bales negligently stowed. *Leathers v. Blessing*, 747.

2. A writ of prohibition will not be granted to restrain an admiralty court from proceeding in a cause instituted to recover damages for loss of life occasioned by a collision. *Ex Parte Gordon*, 267.

3. The Act of Congress of February 16th 1875, confining the appellate jurisdiction of the Supreme Court to questions of law, is constitutional. *Duncan v. Steamship Francis Wright*, 747.

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9. The Limited Liability Act of 1851, reproduced in sects. 4283, &c., Rev. Statutes, applies to owners of foreign as well as domestic vessels, and to acts done on the high seas, except when a collision occurs between two vessels of the same foreign nation, or, perhaps, of two foreign nations having the same maritime law. *Nat. Steam Nav. Co. v. Dyer*, 479.

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2. A real estate broker who assumes to act for both parties in an exchange of lands, cannot recover compensation for both without showing full knowledge of and assent to the double compensation, but when such consent is shown, he may recover from each party. *Bell v. McConnell*, 135.

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5. An agent to sell has no implied power to agree to pay commissions to another. *Atlee v. Fink*, 678.

6. Fraud of, committed in line of employment, renders the principal liable. *Hopkins v. Hawkeye Ins. Co.*, 748.

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9. Knowledge of agent obtained prior to his employment, is notice to the principal when it is so fully in mind that it would not have been forgotten, and so material as to create a duty to disclose it. *Fairfield Savings Bank v. Chase*, 68.

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3. Where wages of a seaman are attached, and the owners are compelled by admiralty proceedings to pay such wages, they will not be charged as trustees. *Eddy v. O'Harra*, 807.

4. Whether wages of a seaman on a coasting voyage are subject to attachment. *Quære. Id.*

5. Garnishee cannot contest the validity of the original judgment because of failure to comply with all the provisions of the Code. *Cowan v. Lowry*, 68.

6. In foreign attachment where the answer of the garnishee shows no indebtedness at the time of the attachment, the court has no jurisdiction, although the garnishee admits an indebtedness at the time of answer. *Morris v. Union Pacific Railroad*, 420.

7. In trustee process plaintiff may put interrogatories to the trustee calculated to elicit facts which will tend to charge him, but not to contradict or impeach him. *Nutter v. Framingham & Lowell Railroad Co.*, 345.

8. An attaching creditor cannot maintain an action to redeem land covered

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by his attachment from a mortgage executed by the debtor. *Fisher v. Tallman*, 345.

9. A plaintiff has no greater rights against the garnishee than the defendant would have had. *Waldron v. Wilcox*, 346.

10. An order by a court of one state requiring a debtor to the defendant in a judgment recovered therein to pay the debt to the plaintiff, will be recognised by the court of another state if the debt so ordered to be paid is in the custody of the latter court, but not if the moneys are in the hands of a corporation of the latter state which had not been summoned in the proceedings. *Elizabeth-town Sav. Inst. v. Gerber*, 615.

11. Whether moneys can be attached in one state in the hands of a litigant in the courts of another state when the time for pleading on the part of such litigant has expired. *Quere. Id.*

12. A statute authorized an attachment where the debtor had fraudulently conveyed his property, and also where he had fraudulently concealed or disposed of it: *Held*, that the word "disposed" did not include any alienations covered by the other sections of the statute, and that a charge of fraudulent disposal was not proved by evidence of a fraudulent mortgage. *Bullene v. Smith*, 73.

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1. Compromise by, without the knowledge of the client, is invalid, but the leaning of the courts is in favor of upholding such compromise if fairly made. *Whipple v. Whitman*, 475.

2. The assent of the equitable party to the compromise is sufficient without the assent of the legal party. *Id.*

3. A compromise by an attorney, of a wife's suit, with her consent, will not be set aside upon the petition of the husband filed a year afterward. *Id.*

4. Has no power to compromise a cause although his client lives in another state. *Granger v. Batchelder*, 678.

5. Has no power to compromise claims, but a ratification of such a compromise may be inferred from acquiescence of the client or from other circumstances. *Fritchey v. Bosley*, 343.

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8. Attorneys engaged jointly in a suit are as to that suit partners and divide equally the compensation, and neither has any remedy against the other for failure to perform his full duty. *Henry v. Bassett*, 678.

9. The proper scope of the right to charge a retainer is to compensate counsel for the loss of the opportunity of being employed by the other side. *McLellan v. Hayford*, 68.

10. There is no such general custom to charge retainers as would justify a binding instruction that they were a legal charge in such case. *Id.*

11. When there is an express agreement for a particular fee the client should be credited thereon with an allowance to the attorney, decreed by the chancellor in equity proceedings to be paid to the attorney out of the estate. *Shreve v. Freeman*, 678.

12. An agreement to prosecute an action for one-half the amount recovered in case of success, and for nothing in case of failure, is void for champerty, and the client may recover from the attorney the whole amount recovered, less the costs paid. *Achert v. Barker*, 543.

13. Women are entitled to admission to the bar under a general statute not confined in terms to the male sex. *In re Mary Hall*, 728, and note.

BAILMENT.

1. A bailee cannot acquire title to the property adverse to that of his bailor through a tortious seizure and sale of the property by a third person. *Enos v. Cole*, 134.

2. Moneys paid by the bailee at such a sale without authority from the bailor cannot be recovered from the latter. *Id.*

BAILMENT.

3. The property having returned to the bailee, the bailor cannot, without proof of actual damage, maintain an action against such third person as for a conversion. *Enos v. Cole*, 134.

4. An artisan has a lien for work done on property whether under an express agreement for a stipulated price or an implied contract for reasonable compensation, and if several articles are included in one contract, he has a lien on each for the work done on the whole. *Hensel v. Noble*, 616.

BANK. See AGENT, 4, 8. CONTRACT, 11. CORPORATION, 3, 4, 5, 27. EXECUTORS, 7. NATIONAL BANK. TAXATION, 10, 16-19.

1. Is not liable for a failure of duty on the part of a notary in whose hands it has placed for protest notes sent to it for collection. *Britton v. Nicolls*, 544.

2. Has no lien upon moneys deposited by one as agent with notice to the bank of the principal for debts due by the agent, even though the agent sometimes deposited his own moneys in the account and drew checks for his private use. *Cent. Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 68.

3. The certification of a check by the bank on which it is drawn is equivalent to an acceptance, and the bank may be sued thereon by any holder. *Louisiana Ice Co. v. State Nat. Bank*, 135.

4. When a bank receives on deposit checks or notes, the deposit is usually for collection only, and the depositor may revoke the bank's agency. *Id.*

5. A depositor is not bound by the rules of a clearing house to which the bank belongs. *Id.*

BANKRUPTCY. See CORPORATION, 22. DEBTOR AND CREDITOR, 11.

1. A subscription to the stock of a corporation is a debt which is barred by a discharge in bankruptcy. *Morrison v. Savage*, 342.

2. Assignee allowing bankrupt to continue suit in his own name, is bound by the judgment. *Thatcher v. Rockwell*, 807.

3. New promise by bankrupt, after adjudication and before discharge, is binding. *Knapp v. Hoyt*, 807.

4. An assignee in bankruptcy cannot maintain a bill to compel the execution of an agreement among secured creditors not affecting the general estate. *Dudley v. Easton*, 135.

BILL OF EXCEPTIONS. See ADMIRALTY, 4.

1. Should not contain the charge in full but only the parts necessary to point the exceptions. *United States v. Rindskopf*, 748.

2. The signature of the judge should be withheld until the bill is freed from irrelevant matter. *Id.*

BILL OF LADING. See COMMON CARRIER, 4.

When given by a master or shipping agent for goods not received, is void in the hands of a subsequent *bona fide* purchaser. *Pollard v. Vinton*, 544.

BILL OF REVIEW. See EQUITY, 17.

After decree on the merits and remittitur, an appellate court has no jurisdiction to entertain a bill of review. *Putnam v. Clark*, 616.

BILLS AND NOTES. See CHECK. EVIDENCE, 9. EXECUTORS, 4. LIMITATIONS, STATUTE OF, 2. LUNATIC, 1. PARTNERSHIP, 18, 21. PAYMENT, 1. SURETY, 5. USURY, 2, 3

I. Form, consideration, &c.

1. Where a bill is signed, "Bellville Nail Mill Co., A. B., Prest., C. D. Secy.," the officers signing are not individually liable. *Hitchcock v. Buchanan*, 679.

II. Rights of parties.

2. That a third party holds a negotiable note for a valuable consideration will not of itself deprive the maker of defences valid against the payee. It must appear that the note was purchased in the usual course of business or for its face value. *Millard v. Bartom*, 807.

3. Maker cannot show payment to third party in accordance with contemporaneous parol agreement differing from terms of note. *Draper v. Rice*, 417.

BILLS AND NOTES.

4. Possession of note by personal representative of payee, is *prima facie* evidence that it is not paid, and throws on maker the burden of proving payment. *Ritter v. Schenck*, 267.

5. Payment of interest on note in ignorance of his rights will not estop maker from proving prior payment in full. *Id.*

6. The seller of note does not warrant the solvency of the maker. *Day v. Kinney*, 267.

7. A note given under threat of suit, and in settlement of a claim known to both parties to be fraudulent, is void in the hands of a third party who was a general purchaser of the payee's notes, and knew of his dishonest methods of obtaining them. *Ormsbee v. Howe*, 679.

8. In a suit between the parties to a note, the defendant may show by parol want of failure of consideration. *Ingersoll v. Martin*, 748.

9. It is not as a matter of law negligence for the maker of a note to trust to the agent of the payee to read it correctly. *Hopkins v. Hawkeye Ins. Co.*, 748.

10. A statute requiring the defendant's denial of signatures to a written instrument to be by plea verified by affidavit, does not apply to a case where defendant claims that the instrument is on its face the contract of his principal and not his own. *Hitchcock v. Buchanan*, 679.

III. *Endorsement, Acceptance, &c.*

11. An acceptance of a draft drawn by an agent is a guarantee of the agent's authority as to innocent holders, but not as to the party who first received the draft and who was bound to have made inquiry. *Agnel v. Ellis*, 198.

12. The acceptance by a creditor of a note of his debtor, or of a third person, is not presumed to be in payment of the debt, but as collateral security or conditional payment. *Hunter v. Moore*, 514, *and note*.

13. If conditional payment, it is necessary to inquire what the condition was, and if not fulfilled, what injury has resulted from the breach. *Id.*

14. A creditor transferring such note to his creditor by delivery only, is not relieved by the failure of the creditor to give him notice of non-payment unless actual damage results therefrom. *Id.*

15. Nor by acceptance by the creditor from the maker of the note of a draft subsequently protested. *Id.*

16. Accommodation endorser liable to one who takes the note as collateral for an antecedent debt. *Pitts v. Foglesong*, 417.

17. Blank endorsement will be construed to give effect to the intention, and may be explained by parol. *Owings v. Baker*, 69.

18. Third party endorsing before payee may avoid the presumption that he is liable as joint promisor by proving a different understanding of all the parties, payee included. *Id.*

19. If a note payable to order be transferred without endorsement, the transferee cannot sue in his own name. *State v. High Bridge M. E. Ch. Asso.*, 679.

20. Third party signing note after delivery incurs no liability thereon. *McMahan v. Geiger*, 69.

21. One signing a note after others, without explanation as to the character in which they have signed, may assume that they are joint makers, and he will become liable as surety or guarantor for all; but whether surety or guarantor is not decided. *Id.*

IV. *Presentment, &c.*

22. The drawer of a draft is discharged by the acceptance by the payee of the drawer's check, and a failure to present such check until a day after it could have been collected. *Fernald v. Bush*, 544.

23. Where a notary is unable, after diligent inquiry, to ascertain the address of the drawer of a draft, he may direct the notice of protest to him at the place where the draft was drawn or dated. *Page v. Valery*, 135.

BOARD OF TRADE.

Nature of right of membership in. *Note to Smith v. Barclay*, 408.

BOND. See OFFICER.

BRIBERY. See CONSTITUTIONAL LAW, 4. CRIMINAL LAW, III.

BROKER. See AGENT, 2. CUSTOM, 1. ESTOPPEL, 2.

1. Is entitled to compensation when he finds one who makes a written contract of purchase or sale with his employer. *Veazie v. Parker*, 69.

2. It is no part of his duty to advise as to the terms of the contract or explain its words. *Id.*

3. Conversations between buyer and seller before and after the contract not admissible to affect his compensation. *Id.*

BUILDING ASSOCIATION. See CORPORATION, 16.

BURDEN OF PROOF. See CRIMINAL LAW, 1, 28-30. DEBTOR AND CREDITOR, 6. HUSBAND AND WIFE, 11. LUNATIC, 5. NEGLIGENCE, 4.

CANAL. See CONSTITUTIONAL LAW, 5.

CASES AFFIRMED, COMMENTED ON, OVERRULED, ETC.

Allen v. Merchants' Bank, 22 Wend. 215, disapproved. *Britton v. Nicolls*, 544.

Arimond v. Green Bay and M. Canal Co., 31 Wis. 316, distinguished. *Black River Imp. Co. v. La. C. Booming and Trans. Co.*, 424.

Boxborough v. Messick, 6 Ohio St. 448, distinguished. *Pitts v. Foglesong*, 417.

Boyd v. Mosely, 2 Swan 660, distinguished. *Mississippi Mills v. Union and Planters' Bank*, 534.

Cook v. Corthell, 11 R. I. 482, explained and distinguished. *Carpenter v. Scott*, 551.

Cumber v. Wane, 1 Str. 426, commented on. *Goddard v. O'Brien*, 637.

Davis v. Brown, 94 U. S. 423, distinguished. *Martin v. Cole*, 73.

Day v. Baldwin, 34 Iowa 380, distinguished. *Kerdt v. Porterfield*, 548.

Delaplaine v. C. and N. W. Railway Co., 42 Wis. 230, distinguished. *Black River Imp. Co. v. La. C. Booming and Trans. Co.*, 424.

Dorchester, &c., Bank v. New England Bank, 1 Cush. 177, followed. *Britton v. Nicolls*, 544.

Frazier v. State, 23 Ohio St. 551, approved and followed. *McHugh v. State*, 618.

Gaff v. Flesher, 33 Ohio St. 115, 453, approved and followed. *Rorland v. Meader Fur Co.*, 617.

Henning v. U. J. Ins. Co., 47 Mo. 425, distinguished. *Baile v. St. Joseph F. and M. Ins. Co.*, 37.

King v. Nichols, 16 Ohio St. 80, approved. *Dawson v. The State*, 421.

Lewis v. Railroad Co., 59 Mo. 495, followed. *Hall v. Mo. Pac. Railroad Co.*, 485.

Morrison v. Hancock, 40 Mo. 564, overruled. *Deardorff v. Everhardt*, 348.

Niles v. Gray, 12 Ohio St. 320, followed. *Pratt v. Sinton*, 269.

Railway Co. v. Cumminsville, 14 Ohio St. 524, approved. *Scioto Valley Railroad Co. v. Lawrence*, 422.

Ross v. Epsy, 66 Pa. St. 483, dissented from. *Martin v. Cole*, 73.

Susquehanna Bridge Co. v. Evans, 4 Walsh. Cir. Ct. Rep., dissented from. *Martin v. Cole*, 73.

A Remark in *School District v. Zink*, 25 Wis. 636, overruled. *Williams v. Williams*, 619.

Vyne v. Glenn, 41 Mich. 112, distinguished. *Hackley v. Headley*, 109.

Williams v. Briggs, 11 R. I. 476, explained and distinguished. *Carpenter v. Scott*, 551.

CAVEAT EMPTOR. See JUDICIAL SALE, 1.

CHAMPERTY. See ATTORNEY, 12.

CHARITY.

1. Bequest to "benevolent associations of this city for the benefit of white and colored children" is void for uncertainty. *The Henry Watson Childrens' Aid Soc. v. Johnston*, 748.

2. A gift of a fund to establish and maintain a school of learning is a charitable trust. *Taylor's Ex'rs v. Trustees of Bryn Maur College*, 70.

CHARITY.

3. A court will not administer a foreign charity, but where such charity is valid and the trustees have capacity to receive the fund and administer it, the court will order its payment to them. *Taylor's Ex'rs v. Trustees of Bryn Mawr College*, 70.

4. A trust to employ the income of moneys for the relief of the most deserving poor of a city forever, without regard to color or sex; but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund, with a power of appointing and substituting trustees for those named, is a valid charity, and will be executed. *Hesketh v. Murphy*, 659.

5. What trusts will be supported as charities. *Id.*, Note.

CHATTEL MORTGAGE. See **MORTGAGE**, II.**CHECK.** See **ACCORD**, 7. **BANK**, 3, 4. **BILLS AND NOTES**, 22. **GIFT**, 6.

The mere fact that the holder of a check received it when eight days overdue does not render his title subject to the equities between the drawer and payee, but it is a question for the jury whether the check was taken under circumstances which should have excited suspicion, and the fact that it was eight days overdue is evidence on that question. *London, &c., Bank v. Groome*, 770, and note.

CITIZENSHIP. See **REMOVAL OF CAUSES**, I.**CITY.** See **MUNICIPAL CORPORATION**.**COLLATERAL SECURITY.** See **PLEDGE**.**COLLISION.** See **ADMIRALTY**, II.**COMMITTEE.** See **PARTNERSHIP**, 6.**COMMON CARRIER.** See **RAILROAD**, 1, 2.

1. Is liable for safe carriage of baggage checked to point beyond its own line for passengers travelling on coupon tickets. *Louisville & Nashville Railroad v. Weaver*, 748.

2. The liability of a railroad company as a carrier ceases when the freight is deposited in a warehouse, and is not extended by a statute requiring notice to the consignee. *Butler v. Railroad Co.*, 70.

3. Though a railroad stipulates that it is not to be responsible for attention to live stock, yet if it carries the stock beyond their destination it is liable for loss by want of such attention while they are detained. *Bryant v. Southwestern Railroad*, 343.

4. A general stipulation in a bill of lading will not limit the liability of a common carrier, nor will an express contract protect him from the results of his own negligence. *Georgia R. & B. Co. v. Gann*, 267.

5. Where goods are shipped over connecting lines the last road receiving them in good order is liable to the consignee for damages. *Id.*

6. The receipt of goods for transportation without exception is impliedly a receipt as in good order, and renders the carrier liable for any injury. *Id.*

7. In the absence of special contract a common carrier is not liable for loss of the goods after delivery to the next succeeding carrier on a through route, nor will such contract be implied from the fact of an arrangement among the carriers for a stipulated tariff for the whole route to be apportioned among them. *St. Louis Ins. Co. v. St. L., Vt. & I. Railroad Co.*, 136.

COMMON LAW.

1. A statute adopting the common law of England does not require the courts to enforce the local customs of that realm. *Han. & St. J. Railroad v. Crane*, 480.

2. **ADOPTION OF, BY THE AMERICAN COLONIES**, 553.

CONDITIONAL SALE. See **DEBTOR AND CREDITOR**, 4, 5. **SALE**, 1, 3.**CONFESSION.** See **CRIMINAL LAW**, 3.

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CONFLICT OF LAWS. See ATTACHMENT, 10. EVIDENCE, 10. HUSBAND AND WIFE, 1, 3. RECEIVER, 4. UNITED STATES COURTS, 5.

1. Where the rolling-stock of a railroad is attached by unsecured creditors in one state pending an application for a receiver in another state by creditors secured by a mortgage covering the road and its equipments, the receiver subsequently appointed may, under the comity between states, assert his right to the stock by an action in his own name in the state in which it was attached. *Merchants' Nat. Bank v. McLeod*, 617.

2. The state courts will respect as valid a judgment of a federal court against a county on its bonds, notwithstanding the same bonds are held by the state courts to be void. *State v. Rainey*, 480.

3. A state will not recognise the right of inheritance of an adopted child under the laws of another state in which the adoption took place, if, under its own laws, no such right exists. *Keegan v. Geraghty*, 198.

4. As against an adopted child, a statute regulating descents should be strictly construed. *Id.*

CONSIDERATION. See CONTRACT, 6, 12.

CONSTITUTIONAL LAW. See ADMIRALTY, 3. CRIMINAL LAW, 18. DESCENT, 2. INTOXICATING LIQUORS. MUNICIPAL CORPORATION, 1, 12, 16. TAXATION, 1, 3, 7.

Powers of Legislature.

1. The legislature may pass a Statute of Limitation for suits on existing causes of action, provided that a reasonable time be given before the bar of the statute commences. *Town of Koshkonong v. Burton*, 548.

2. If interest on interest be allowed by the local law at the time of the contract, that right cannot be taken away by a subsequent legislative declaration as to what was the intent of the statutes prescribing the rate of interest in force at the time the contract was made. *Id.*

3. An act to compromise the bonded indebtedness of a state, which provides for the issuing of new bonds, the coupons of which shall be receivable in payment of all taxes and debts due the state, except for taxes for the school fund, is unconstitutional, and the officers of the state may, at the suit of a tax-payer, be enjoined from issuing such bonds. *Lynn v. Polk*, 321, and note.

4. The courts cannot enjoin the execution of a statute because of alleged bribery of members of the legislature to pass it. *Id.*

5. A state leasing surplus water from a canal, reserving the right to resume the privilege when not necessary for navigation, is not bound to maintain the canal for the benefit of the lessees after it has ceased to be needed for navigation, and a statute abandoning it is valid. *Fox v. Cincinnati*, 417.

6. A statute as to peddlers' licenses, which discriminates against the productions of other states, is void. *State v. McGinniss*, 417.

7. The legislature may enlarge or diminish the powers of a county and vary its boundaries. It may, after part of the territory of another county has been added to it, require payment of part of the latter's debt, and may direct how the debt shall be ascertained. *Pulaski County v. County Judge of Sabine County*, 417.

8. A statute making the notorious character of the premises, or the intemperate character of persons frequenting the same, or the keeping of the usual implements of tippling shops, *prima facie* evidence that liquors are kept on the premises for sale is unconstitutional. *State v. Beswick*, 199.

9. Statutory provisions whereby different classes of property are listed and valued for taxation in different modes, are not necessarily in conflict with a constitutional provision that all property shall be taxed by a uniform rule and according to its true value. *Wagoner v. Loomis*, 423.

10. Where a statute enacts that every act of incorporation shall be subject to repeal, such right of repeal becomes part of every subsequent charter. *Greenwood v. Union Freight Railroad Co.*, 481.

11. After such repeal a corporation can originate no new transactions which could not be exercised by unincorporated persons. *Id.*

12. The rights of the shareholders to the property of the corporation, and rights of contract and choses in action are not destroyed by such repeal, and if

CONSTITUTIONAL LAW.

the legislature has provided no specific mode of enforcing such rights, the courts will do so by the means within their power. *Greenwood v. Union Freight Railroad Co.*, 481.

13. So far as the property or franchises of the old corporation were necessary to the public use, the legislature could authorize a new corporation to take them on making due compensation. *Id.*

14. A statute which, under a reserved right, repeals an act of incorporation and creates a new corporation with similar powers, the use of which requires the exercise of eminent domain, is not unconstitutional if it provides for compensation for the property of the extinct corporation so taken by the new one. *Id.*

15. The imposition by a state upon every telegraph company doing business within its borders, of a tax on every message, is unconstitutional as to messages sent out of the state, and as to messages of the federal government. *Western Union Tel. Co. v. State of Texas*, 544.

16. A statute imposing a penalty upon "every person who shall keep a place in which it is reported that intoxicating liquors are kept for sale, without having a license therefor," is unconstitutional. *State v. Kartz*, 544.

17. Legislation which does not violate any constitutional prohibition may be retroactive, but such construction is not favored by the courts. *Dours v. Cazentre*, 544.

18. Where the title of an act gives notice of only a part of the matters contained therein, it is valid as to such part and void as to the residue. *Dechurst v. City of Allegheny*, 617.

19. Where a statute authorizes a township to convey a farm within its limits to a city, and declares that the farm should remain liable to taxation by the township, such power of taxation may be repealed. *State v. Williamson*, 679.

20. A declaration in a general law that all acts or parts of acts inconsistent with it are repealed, will repeal inconsistent provisions in prior special acts. *Id.*

II. Powers of the Judiciary.

21. The courts will not interfere with the exercise of a discretion vested by law in any executive officer of a state, but where the discretion has been lawfully exercised by the legislature, the courts will compel the obedience of such officer thereto. *State of Louisiana v. Jumel*, 136.

22. A proceeding to compel the state auditor to disobey the instructions of the state to distribute the state funds is an action against the state, which, by reason of its sovereignty, will not lie. *Id.*

III. Eminent Domain.

23. Where the construction of a railroad in a street will work material injury to the abutting property, such construction may be enjoined until proceedings are instituted for the appropriation of private property according to law. *Scioto Val. Railroad v. Lawrence*, 422.

24. Authority given to a railroad to build upon or across any highway, with a stipulation that the highway shall be restored to its former state, or so as not to impair its usefulness, does not authorize a use to the exclusion of ordinary travel thereon. *P., Ft. W. & C. Railroad v. Reich*, 201.

CONTEMPT.

1. After a rule against a sheriff to pay money has been made absolute, he cannot be attached for non-compliance, without a rule to show cause. *Mize v. Barsden*, 808.

2. A justice of the peace cannot commit to prison for non-payment of a fine for contempt where the judgment imposing the fine does not provide for imprisonment; and he is liable in damages for such commitment. *Laupher v. Dewell*, 545.

CONTRACT. See BANKRUPTCY, 3. CORPORATION, 7. EVIDENCE, 1, 3, 4, 9. GUARANTY. INFANT. LUNATIC. MASTER AND SERVANT, 1, 2. PUBLIC POLICY. SHERIFF'S SALE, 1.

1. The signature of the party to be charged is not necessary to the validity of a written contract not within the Statute of Frauds. *Bacon v. Titus*, 136.

CONTRACT.

2. An agreement between the parties to a contract and a third person whereby one party is released from the obligations of the contract, and the third person substituted, is a novation, and requires no further consideration than such release and substitution. *Bacon v. Titus*, 136.

3. A clause in a contract of sale that the measurement shall be by a person named is obligatory in default of fraud, and a simple averment in an answer that the measurement is not correct will not warrant the introduction of evidence to contradict or amplify the contract. *Dauner v. Otis*, 200.

4. In a suit on a stockbroking contract evidence is admissible to show the meaning of the words "on margin" in the business, and if it appears that the contract was not one for the mere payment of differences, but for the actual purchase of stock it is not a gaming contract. *Hatch v. Douglass*, 199.

5. The custom of stockbrokers to debit and credit interest monthly, computing interest on balances, does not necessarily involve usury. But if it did it is only a question of its allowance by the courts and does not affect the contract for the purchase of the stocks. *Id.*

6. A. sold goods to B. taking in payment the standing wood on a farm held by B. Of this wood the amount brought to market by A. only paid the outlay for cutting and hauling, and the trade with B. was made pending equity proceedings which involved the title to the farm and which resulted adversely to B. Held, that there was a total failure of consideration, and that A. could maintain assumpsit against B. for the value of the goods. *Peckham v. Kiernan*, 199.

7. A contract containing the words "we promise to pay," and signed by two persons describing themselves respectively as "president school board" and "secretary school board," but which contained no reference to any school district: Held, to be the personal obligation of the signers, and that they could not show by parol evidence a contrary intention. *Wing v. Glick*, 545.

8. Upon a sale of merchandise to be delivered in successive parcels, the purchaser may rescind for non-delivery of one. *Norrington v. Wright*, 395, and note.

9. The vendor in such cases cannot insist upon the contract being treated as severable, for the purpose of avoiding the right of rescission. *Id.*

10. The right of rescission is not waived by an acceptance of a portion in ignorance of a default as to the remainder. *Id.*

11. A guaranty of a third person upon a note given by a director to a bank for an indebtedness prohibited by the bank's charter is void and cannot be recovered upon. *Workmen's Banking Co. v. Raatenberg*, 680.

12. A release on payment of part of debt is *nudum pactum*, but if under seal the seal imports consideration. *Ingersoll v. Martin*, 749.

13. A promise to pay made after a release is not binding. *Id.*

14. A., owning a railroad, informed B., who was using it, that he would thenceforth charge \$2 per car. B. replied that he would not pay it, and continued to use the road: Held, that A. could only recover the reasonable value of the use of the road. *Curtis v. Giers*, 749.

15. A. owed B., and C. owed A.: by agreement of the three, C. gave his note to B., and was substituted in place of A. as B.'s debtor. C. was insolvent at the time, but this fact was unknown to all the parties. Held, that the loss fell on B. *Cadens v. Teasdale*, 70.

16. A contract provided that certain logs purchased should be measured in accordance with the scale in general use on Muskegon Lake. Held, that the scale in use at the time of measurement, and not that in use at the time of contract, was the one intended. *Hackley v. Headley*, 109.

17. On an issue to determine whether services were rendered gratuitously by a son-in-law, there was evidence that the parties lived together on the father-in-law's land; that the father-in-law said he expected to live there all his days: that the land was to be his daughter's when he died, and that he intended to pay his way. Held, sufficient to warrant a verdict in favor of the son-in-law. *James v. Cummings*, 808.

COPYRIGHT.

1. The deposit of two copies of the copyrighted publication with the librarian of Congress, must be proved in an action for infringement. *Merrill v. Tice*, 344.

COPYRIGHT.

2. A memorandum of such deposit upon a copy of the record of the title page certified by the Librarian of Congress, is not competent evidence thereof. *Merrill v. Tice*, 394.

3. Whether the certificate of the librarian, under his official seal, that the books had been deposited would be competent evidence, *quære*. *Id.*

CORPORATION. See ATTACHMENT, 1. BANKRUPTCY, 1. BILLS AND NOTES, 1. CONSTITUTIONAL LAW, 10-14. CONTRACT, 7. INSURANCE, 13. MUNICIPAL CORPORATION. PARTNERSHIP, 5. RECEIVER, 8. REMOVAL OF CAUSES, 1.

1. An ouster of a corporation *de facto* from its franchises, is no defence to a suit by a creditor against stockholders to enforce payment of their stock subscriptions. *Rowland v. Maeder Fur. Co.*, 617.

2. Corporations *de facto* and *de jure* stand on the same footing as respects their liability to creditors. *Id.*

3. Where a corporation unjustifiably refuses to make a transfer on its books, an actual transfer by delivery of the certificate is good as against an attaching creditor without notice. *Merchants' Nat. Bank v. Richards*, 344.

4. A statutory provision that no stockholder indebted to a bank shall transfer his stock may be waived by the cashier, notwithstanding the fact that he is a member of the firm which owns the stock, if there be no collusion. *Cecil Nat. Bank v. Watstown Bank*, 545.

5. Such lien may be lost by a transfer of the stock on the books of the bank without the issuing of a certificate to the transferee. *Id.*

6. A creditor to whom stock had been transferred on the corporation books as collateral security, subsequently on payment of the debt endorsed the certificate to another creditor at the request of the debtor. Before this transfer was made on the books the stock was attached as the property of the debtor. The by-laws provided that "all transfers of stock shall be made in the books of the company." *Held*, That the attachment could not be sustained. *Beckwith v. Burroughs*, 200.

7. An executory contract between a manufacturing corporation and one of its stockholders for the purchase of the latter's stock by the corporation, cannot be enforced. *Coppin v. Greenlees & Rawson Co.*, 618.

8. It is beyond the powers of a railroad, or of a corporation chartered for the manufacture and sale of musical instruments, to guarantee the payment of the expenses of a musical festival. *Davis v. Old Colony Railroad Co.*, 545.

9. The fact that the use of a wharf by a railroad company as a public wharf is *ultra vires*, is no ground for an injunction at the suit of one whose only interest is that as lessee of an adjoining public wharf he will be injured by the competition in business. *New Orleans, M. and T. Railroad Co., v. Ellerman*, 618.

10. A railroad company has an implied power to borrow money, and may do so by a perpetual loan secured by irredeemable bonds sold at a discount, and entitling the holder, upon a contingency, to a share in the profits in addition to interest. *Phila. and Reading Railroad Co., v. Stichter*, 713, *and note*.

11. Where the bank account of a corporation is overdrawn upon checks signed by the president and secretary, there is a presumption in favor of the officers' authority which will support an action against the corporation in the absence of affirmative proof of the want of such authority. *Mahoney Min. Co. v. Anglo-California Bank*, 100.

12. General presumption as to authority of officers of corporations. *Id.*, *note*.

13. A bill by a stockholder against the corporation and a third party to protect the interests or enforce the rights of the corporation will only lie in cases of unauthorized, illegal or oppressive action of the board of directors or of a majority of the stockholders in violation of the rights of the other stockholders. *Hawes v. Contra Costa Water Co.*, 252.

14. Complainant must allege in the bill his ownership of stock, his efforts to obtain redress and the *bona fide* character of the suit. *Id.*

15. A director may become a creditor of the corporation, but is not thereby divested of his responsibility as a director, and a sale under a mortgage held

CORPORATION.

by him will be set aside upon slight evidence of *mala fides*. *Hallam v. Indianola Hotel Co.*, 443, and note.

16. The director of a building association who has executed a mortgage to it for a loan cannot, in foreclosure proceedings, set up as a defence a secret agreement with the other directors that the loan was to be repaid by full payment of his shares of stock. *Pangborn v. Citizens' Building Association*, 618.

17. An agreement to guarantee the stock of another corporation is not a guarantee to the individual purchasers of the stock of the other corporation, although a memorandum of it is endorsed on the certificates. *Flagg v. Manhattan Railway Co.*, 775, and note.

18. A release of such guarantee by the directors of the corporation to which it was made is valid if made in good faith. *Id.*

19. Such release will not be set aside because some of the directors voting were also stockholders in the guarantor corporation, if without their votes a majority of the directors present voted for the release. *Id.*

20. Where the amount of the capital stock of a corporation is limited by charter, all stock issued in excess of the limit is void. *Scovill v. Thayer*, 481.

21. A holder of such stock is not entitled to the rights or subject to the liabilities of a holder of authorized stock. *Id.*

22. An agreement between a corporation and its stockholders that no further assessments shall be made on its stock which is not fully paid, is void as to creditors, but proceedings in the interest of the creditors to set aside the agreement is a prerequisite to suits by the assignee in bankruptcy of the corporation to recover the unpaid subscriptions. *Id.*

23. Where a question concerning the right of the member of an order to benefits has been decided by a tribunal of the order to which the member referred it in a method prescribed by the by-laws, such decision is a bar to an action at law for the same cause. *Osceola Tribe v. Schmidt*, 482.

24. Assets of a corporation are a trust fund for payment of its debts, and may be followed into the hands of a purchaser with notice, and a purchase by a director is presumed to be with notice. *Jones v. Arkansas Mechanical & Agricultural Co.*, 749.

25. Such purchase is not void but voidable. *Id.*

26. The assets of an insolvent corporation are not turned into a trust fund by the mere knowledge of its officers of its insolvency. *Comfort v. McTeer*, 70.

27. Where after knowledge of such insolvency the officers entered a credit to a customer which was justified by the course of dealing with him, a subsequent assignee of the bank for the benefit of creditors is bound thereby. *Id.*

28. DISFRANCHISEMENT FROM PRIVATE CORPORATIONS, 689.

CORPSE.

1. Cannot be disposed of by will, and no action lies against the executors for the expenses of cremation performed under directions in the will. *Williams v. Williams*, 508, and note.

2. It is the duty of executors to bury the body, and they are entitled to its possession, and possession obtained for the purpose of cremation under a license given with the understanding that the body was to be buried is illegal. *Id.*

COSTS. See ATTORNEY, 11. ERRORS AND APPEALS, 11. JUDGMENT, 4. TRUST, 3. WILL, 8, 16-18, 21.

1. Where one *cestui que trust* has carried on litigation for the common benefit he will be allowed out of the trust fund his counsel fees and legal expenses, but not his private expenses. *Trustees of Int. Imp. Fund v. Greenough*, 680.

2. The practice of allowing extravagant counsel fees and commissions out of trust funds disapproved. *Id.*

CO-TENANTS. See RECEIVERS, 9.

COUNTY. See MUNICIPAL CORPORATIONS.

COURTS. See MUNICIPAL BONDS, 1.

Jurisdiction of inferior courts can be collaterally attacked. *Culver's Appeal*, 268.

COURT MARTIAL. See HABEAS CORPUS, 2.

COVENANT. See ACTION, 3. JUDICIAL SALE, 2.

No special form of words is necessary in order to charge a party with covenant, but it must appear from the whole instrument that there was an agreement on the part of the person sought to be charged to do or not to do some act. *Hale v. Furch*, 200.

CRIMINAL LAW. See ERRORS AND APPEALS, 12. LIBEL, 1, 2.

I. Generally.

1. When an alibi is relied upon, the burden is on defendant to establish it by a preponderance of the evidence. *State v. Hamilton*, 808.

2. The right of a prisoner to appear in person and defend may be waived by him, and if he voluntarily abandons the court room, and refuses to appear, the court is under no obligation to stop the trial. *Sahlinger v. People*, 482.

3. A confession, not induced by promises or threats, is admissible notwithstanding that it was obtained by artifice by the officer in charge of the prisoner. *State v. Phelps*, 482.

4. A defendant may be convicted of violation of the Sunday law by proof of the acts of his employee done with his knowledge and acquiescence. *Seaman v. Commonwealth*, 245.

5. Liability of principal for criminal acts of agent. *Id.*, note.

6. Report made by witness of defendant's statements at the inquest, and used by him to refresh his memory on the trial, is not admissible in evidence. *Commonwealth v. Jeffs*, 808.

7. Mere proximity of a husband, not actually present, will not raise a presumption that the wife acts under his coercion. *State v. Shee*, 546.

8. Any inference of coercion from such proximity is a question of fact. *Id.*

9. One who has formed an opinion is prima facie incompetent as a juror and cannot be accepted, until it appears that his opinion was from mere newspaper statements or rumor and that it will not prevent him from rendering an impartial verdict. *McHugh v. State*, 618.

10. It is not an abuse of the court's discretion to admit a juror who says that he has formed an opinion on rumor, which it would require evidence to remove, but that he has no bias and can try the case impartially. *Casey v. The State*, 418.

11. An accomplice who is not indicted, or is separately indicted, is a competent witness, though convicted, if he has not been sentenced. *Id.*

12. The declarations of an alleged accomplice, in the absence of the defendant, are not admissible against him until other evidence than that of the principal is produced implicating the declarant in the offence. *Id.*

13. The wife of one who is jointly indicted with defendant is not a competent witness for him. *Id.*

14. Requiring the jury to retire during the argument of instructions is a matter of practice within the discretion of the court. *Id.*

15. A new trial will not be granted upon after discovered evidence which might by reasonable diligence have been had on the trial, or which is in its nature impeaching only. *Tobin v. People*, 200.

16. The rules with regard to petitions for new trials, for newly discovered evidence in civil cases, apply to criminal cases, although in capital cases the court will be more inclined to give the petitioner the benefit of any doubt raised by the new evidence. *Hamlin v. The State*, 200.

17. It is one of these rules that the evidence must be sufficient to change the result if a new trial should be had. *Id.*

18. THE RIGHT TO COUNSEL IN A CRIMINAL CASE, 625.

II. Assault.

19. In an indictment for assault and battery, the act must be alleged to have been done unlawfully, and such allegation is not supplied by an allegation of rude, insolent, or angry touching, but it is not necessary that the word "unlawful" should be used if another term of the same import is employed. *State v. Smith*, 193, and note.

III. Bribery.

20. Bribery at a municipal election is a misdemeanor punishable at common law. *State v. Jackson*, 418.

CRIMINAL LAW.

21. An unsuccessful attempt to bribe the elector will subject the offender to indictment. *State v. Jackson*, 418.

IV. Counterfeiting.

22. An indictment on sect. 5431, U. S. Rev. Stat., alleging that defendant, feloniously and with intent to defraud, did pass, utter and publish a falsely made, forged, counterfeited and altered obligation of the United States, but not further alleging that the defendant knew it to be false, forged, counterfeited and altered, is insufficient even after verdict. *United States v. Carll*, 680.

V. Larceny.

23. It is larceny to obtain by threats payment of an excessive charge for work. *Regina v. Lovell*, 705, and note.

24. A pledgee, obtaining possession of the thing pledged from the pledgor, by deception and false pretence, with the felonious design to deprive the latter of his security, is guilty of larceny. *Bruley v. Rose*, 814.

25. When things attached to the realty are detached therefrom they become the subject-matter of larceny even by the person detaching them. *Beal v. State*, 268.

26. Difference between larceny and trespass. *Id.*

27. Evidence of general belief among colored people that property found belongs to the finder, no defence to prosecution under statute making the conversion of such property larceny. *State v. Welch*, 71.

28. The possession of property recently stolen is prima facie evidence of guilt, unless the surrounding circumstances create a reasonable doubt. *Smith v. The People*, 739, and note.

29. The recent possession of stolen property authorizes a conviction, unless the presumption of guilt arising therefrom is overcome by other facts. *State v. Kelly*, 809.

30. But defendant is only required to introduce evidence which creates a reasonable doubt. *State v. Richart*, 809.

VI. Murder.

31. Under a statute providing that wilful, deliberate, malicious and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent upon the question whether he was capable of deliberate premeditation. *Hofst v. People*, 482.

VII. Trespass.

32. It is not a misdemeanor for one to break a partition fence between his lot and another's. Nor is it a trespass to knock off the plank added to it by the other; but destruction of such fence would be a trespass. *Drees v. The State*, 344.

CUSTOM. See COMMON LAW, 1.

1. A general custom that a broker may pledge his customers' stock is valid, and so also is a custom to sell without notice upon a fall of the stock in value below a price which would reimburse the broker. *Vanhorn v. Gilbough*, 171.

2. Effect of stock exchange customs upon non-members. *Id.*, note.

3. Evidence of, inadmissible when contrary to express provision of contract. *Hackley v. Headley*, 109.

DAMAGES. See ADMIRALTY, 5, 13; EQUITY, 6; ERRORS AND APPEALS, 19; HUSBAND AND WIFE, 26; MALICIOUS PROSECUTION, 5, 11, 17, 18; PATENT, 21; SLANDER; TELEGRAPH, 7; TROVER, 4; WATERS AND WATERCOURSES, 2.

1. The measure of damages for breach of contract to convey land if without the fault of the vendor, is the consideration paid with interest, but if the breach occurs through his fault, the value of the land, if greater than the consideration, may be recovered. *Yokom v. McBride*, 546.

2. Where the damages for breach of contract must necessarily be incapable of estimation, as e. g., damages for breach of a contract not to engage in a certain business for a limited time, a sum agreed upon by the parties is liquidated damages and not a penalty. *Newman v. Wolfson*, 809.

DAMAGES.

3. In an action on a warranty of seed, prospective profits on the land planted are not recoverable. *Butler v. Moore*, 483.

4. Beyond the payment of interest a city is not liable to a creditor for his pecuniary embarrassment caused by its failure to meet its obligations. *London v. Tazewell Dist. of Shelby County*, 680.

5. A railroad employee, injured by the negligence of the company, may recover general damages on account of pain, physical injury and depreciation of power to labor, without proof of the value of his labor. *Georgia Southern Railroad Co. v. Neal*, 483.

6. In an action for the wrongful ejection of a passenger from the cars of a railroad, damages are recoverable for injuries caused by the act of plaintiff in walking to the next station, if such walking was rendered necessary by the ejection and was not negligent. *Brown v. C. M. and St. Paul Railroad Co.*, 418.

7. In an action for personal injuries whereby plaintiff was prevented from conducting his business, evidence of the profits of such business is inadmissible. *Bierbach v. Goodyear Rubber Co.*, 419.

8. In an action for an injury to an animal resulting in death, evidence is inadmissible as to the value of the use of the animal between the time of injury and the time of death, and of the value of plaintiff's services in taking care of it, and where a verdict necessarily includes such items it is excessive. *Page v. Town of Sumpter*, 201.

DEBTOR AND CREDITOR. See CORPORATION, 6. HUSBAND AND WIFE, 27. INSOLVENCY. LIMITATIONS, STATUTE OF, 8. PARTNERSHIP, 14. PATENT, 1, 2. UNITED STATES COURTS, 4, 6.

1. The retention of personal property by a vendor after sale is, as against his creditors, presumptive but not conclusive evidence of fraud. *Mead v. Gardiner*, 138.

2. Where a farmer sells a horse to an employee who continues to keep it on the farm, paying a certain sum for its keep, but taking care of it himself, there is no such change of possession as would render the sale valid as to creditors. *Hull v. Sigsworth*, 268.

3. By a contract between A. and B., all the colts thereafter foaled by certain mares sold by B. to A., and kept in B.'s stables under A.'s care, were to belong to A. *Held*, 1. That a valid sale could be made of the colts before they were foaled. 2. That the question of retention of possession by B. could not apply to them, as they were not in existence when the mares were sold to A. and the contract made. 3. That it was not important, upon a question between A. and the creditors of B. as to the title to the colts, whether there had been a legal and visible change of possession as to the mares. *Hull v. Hull*, 201.

4. A sale on condition that the title shall not pass until payment, is valid as against creditors, and is not invalidated by the fact that the property will be consumed in the use, nor by a power of sale given to the vendee. *Lewis v. McCabe*, 217.

5. Distinction between bailments and conditional sales. *Id.*, note.

6. A voluntary conveyance may be set aside by subsequent creditors upon proof of an intention to defraud them, but the burden of proof is upon them to show such intent. *Ingram v. Heather*, 483.

7. Transfer of land by a debtor in consideration of money advanced to him to pay his creditors, and upon the faith of a composition and receipt by such creditors is valid as against them, though they are never paid. *Kuhn v. Weil*, 71.

8. A subsequent creditor seeking to impeach a conveyance, must show actual fraud or that there are debts still unpaid. *Toney v. McGehee*, 750.

9. Fraud is not presumed, and circumstances of mere suspicion leading to no certain results are not sufficient proof. *Id.*

10. A mortgage made to a creditor to defraud other creditors, and kept off of the record in order to give the mortgagor a fictitious credit, is void at common law. *Blennerhasset v. Sherman*, 750.

11. Such mortgage is void under the bankrupt law, although executed more than two months before the filing of the petition. *Id.*

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DEBTOR AND CREDITOR.

12. It is constructively fraudulent for one partner in a firm largely indebted, to make a voluntary conveyance of his individual property. *Barhydt v. Perry*, 755.

13. Subsequent creditors whose means have been used to pay existing debts, may avoid such conveyance. *Id.*

14. To render a conveyance fraudulent it is not necessary to trace fraudulent knowledge to the grantee. *Weir v. Day*, 750.

15. Conveyance made to avoid claim for tort may be set aside as fraudulent. *Id.*

16. Creditor not bound by a composition with the debtor obtained by fraudulent concealment by the latter of his property, and false representation as to his means. *Ackerman v. Ackerman*, 681.

17. Acceptance by trustee of assignment for benefit of creditors if made before the filing of a bill attacking the assignment, enures to the benefit of creditors accepting subsequent to the bill. *Nailer v. Young*, 71.

18. The same effect might, perhaps, result from the legal presumption of the acceptance by beneficiaries of an assignment in their favor. *Id.*

19. An assignment for the benefit of creditors which authorizes the assignee to sell at public or private sale, buy in the premises, resell without responsibility for loss and also to mortgage, and from the proceeds to pay first the creditors secured by mortgage and then the other creditors, is valid. *Wuldron v. Wilcox*, 546.

20. Certificates of membership in a board of trade are property, and may be subjected to the payment of debts by a creditor's bill. *Smith v. Barclay*, 408, and note.

21. Where one orders a chattel to be made, though he pays the whole price in advance, he acquires no title until it is finished and delivered, unless a contrary intent is expressed, and even when such intent is expressed, the chattel is open to attachment by the creditors of the vendor. *Shaw v. Smith*, 201.

22. A creditor having no lien by attachment, levy or otherwise on his debtor's property, cannot maintain an action on the case against third persons for conspiring to defeat his claim by receiving from the debtor fictitious mortgages of his personal property. *Klous v. Hennessey*, 137.

DECEDENTS' ESTATES. See ADVANCEMENT. EXECUTORS. HUSBAND AND WIFE, 22, 23. LIFE TENANT.

An heir who, believing the estate solvent, receives from the executrix land devised to him and makes valuable improvements thereon, is liable on the subsequent insolvency of the estate only for the value of the land without the improvements. *Gillespie v. Murphy*, 750.

DECEIT. See FRAUD, 1-3.

DECREE. See HUSBAND AND WIFE, 4. MORTGAGE, 8, 9. PRACTICE, 3.

DEED. See ACKNOWLEDGMENT. LUNATIC, 4, 5.

1. Delivery to a stranger for delivery to the grantee will pass the title, but recording without the knowledge of the grantee will not. *Byars v. Spencer*, 268.

2. Where a father executes and acknowledges a deed to two minor children, but retains it in his own possession and declines to have it recorded, there is no sufficient delivery. *Id.*

3. Delivery of deed to husband of grantee with intent to pass the title vests the property in the grantee although made without her knowledge. *Parker v. Parker*, 419.

4. Monuments established by a surveyor at the time of survey will always prevail over written descriptions. *People v. Stahl*, 268.

5. Any description for purposes of taxation by which the land may be identified by a competent surveyor with reasonable certainty, either with or without extrinsic evidence, is sufficient. *Id.*

6. A grantee who has accepted a deed poll cannot, in the absence of fraud, show by parol evidence that a certain agreement therein was inserted without his knowledge or authority. *Muhlig v. Fiske*, 269.

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7. A conveyance made in consideration of the support of parents will be set aside upon proof of abandonment of the contract of support. *Jewell v. Reddington*, 750.

8. A conveyance in trust to have and to hold the same as tenants in common so long as they both shall live, and from and after the death of either of them, then unto the survivor so long as she shall live and no longer, or so long as they both shall remain unmarried; and from and after the marriage of either of them, then unto the one remaining unmarried, so long as she shall live and no longer is not against the policy of the law and is valid. *Arthur v. Cole*, 344.

9. Of two inconsistent descriptions, the grantee may elect the one most favorable to him. *Sharp v. Thompson*, 71.

10. Extrinsic evidence of the state of the property at the time of the execution of the deed is admissible to aid in the construction of a doubtful description. *Whitney v. Robinson*, 137.

11. The entry of the grantee, and the making of fences and improvements by him, with the acquiescence of the grantor, constitutes a practical construction of the deed binding on the parties. *Id.*

DELIVERY. See **DEED**, 3.

DEMURRER. See **EQUITY**, 18.

DESCENT.

1. Children of the same mother, whether legitimate or illegitimate, may transmit an inheritance to collateral relatives on the mother's side. *Gregley v. Jackson*, 750.

2. Laws of inheritance may be changed at will during the life of a person without violating any vested right in his expectant heirs. *Id.*

DEVISE. See **WILL**.

DISCOVERY. See **UNITED STATES COURTS**, 4.

DIVIDENDS. See **LIFE TENANT**.

DIVORCE. See **HUSBAND AND WIFE**, I.

DOMICILE.

One leaving Boston for an indefinite stay in Europe, with the design of returning to a new domicile in the United States, and who while in Europe fixes upon such new domicile, nevertheless retains his domicile in Boston for the purposes of taxation during his stay in Europe. *Borland v. City of Boston*, 809.

DONATIO CAUSA MORTIS. See **GIFT**, 5, 6.

DURESS.

1. Taking advantage of a party's financial embarrassment to obtain a settlement for a less sum than is due is not a duress of goods. *Hackley v. Headley*, 109.

2. What constitutes duress. *Id.*, note.

3. A father may avoid a mortgage which he has been induced to sign by threats of the prosecution and imprisonment of his son. *Harris v. Carmody*, 269.

4. A married woman's deed, duly acknowledged, will not be set aside for duress, except on the clearest evidence. *Linnenhemper v. Kempton*, 751.

EASEMENT.

1. Will not arise by prescription where the use has been habitually interrupted at the pleasure of the owner of the servient tenement. *Kirschner v. West. and At. Railroad Co.*, 269.

2. The same rules of law apply to subterranean rights of way as to those upon the surface. *Pomeroy v. Buckeye Salt Co.*, 260.

3. The owner of coal lands, through which another has a subterranean right of way, may construct an entry crossing such way if he does not interfere with its use. *Id.*

4. The appropriation of part of a way by the owner of one of the dominant

EASEMENT.

tenements is an abandonment of his easement in the whole way. *Steele v. Tiffany*, 809.

EJECTMENT.

Where two contestants voluntarily divide the profits of land between them one cannot, in a subsequent action of ejectment against the other, recover such profits. *White v. Rowland*, 270.

ELECTION. See **DEED**, 9.

Mere irregularities, not fraudulent and not affecting the result, will not justify the rejection of the entire poll. *Hodge v. Linn*, 71.

EMINENT DOMAIN. See **CONSTITUTIONAL LAW**, III.**ENCUMBRANCE.** See **MORTGAGE**.**EQUITY.** See **ACTION**, 2, 3; **CORPORATION**, 13, 14; **INJUNCTION**; **INSURANCE**, 1; **LIS PENDENS**, 1; **MORTGAGE**, 8, 9, 14-17; **PATENT**, 1, 2, 11; **SPECIFIC PERFORMANCE**; **TAXATION**, 14.

1. Will not decree a judgment lien to be invalid on the ground of want of legal notice, where there has been actual knowledge of the action, unless a meritorious defence be shown. *Gifford v. Morrison*, 270.

2. Has no jurisdiction to entertain a bill to compel the corporate authorities of a town to issue and deliver its bonds in pursuance of a vote to aid in the construction of a railroad. *Chicago and V. Railroad Co. v. Town of St. Anne*, 202.

3. Where no discovery is sought a bill cannot be maintained by the owners against the master of a vessel sailing her on shares, merely to obtain an account. *Bird v. Hall*, 419.

4. Affirmative relief cannot be granted to respondent upon his answer without a cross bill. *White v. White*, 681.

5. Where in a case cognizable at law the ground on which a court of equity has taken jurisdiction fails, the court will dismiss the bill. *Mitchell v. Dowell*, 751.

6. A court which has issued an injunction has, on the final disposition of the cause, power to make a decree granting or denying damages on account thereof. *Russell v. Furlley*, 651.

7. Such power may be exercised by a federal court to which the case has been removed, although the state courts would not have possessed it. *Id.*

8. *Scnble.* The court may also assess the amount of the damages. *Id.*

9. The decision of the court on the question of damages will not be reversed, except in a very clear case of error. *Id.*

10. Cross bill will not lie where there is no connection between the demands or the parties. *Comfort v. McTeer*, 72.

11. Where a debtor absconds leaving no legal assets, his creditors may at once proceed in equity against his equitable assets, and if their claims are specially fit for legal cognizance, the court may submit them to a jury on issue. *Merchants' Nat. Bank v. Puine*, 810.

12. Has jurisdiction in case of abuse of children to take them out of their parent's custody and appoint a guardian, and such jurisdiction is not taken away by a like power conferred on the probate courts. *State v. Grigsby*, 803.

13. The better practice is to bring such bill in the name of the infant by his next friend, but the bill will not be dismissed because brought in the name of the state. *Id.*

14. Where the facts which render an assessment upon land invalid, are not matter of record, an action to prevent a cloud upon the title, by setting aside the assessment, may be maintained either by the present owner or by one who has conveyed it by warranty deed. *Pier v. Fond du Lac County*, 202.

15. In such an action the grantee, though a proper, is not a necessary party. *Id.*

16. The rule that a bill to remove a cloud upon a title lies only where the complainant is in possession or the land is vacant, does not apply where a deed is sought to be set aside for fraud. *Booth v. Wiley*, 483.

EQUITY.

17. As to bills of review relating to errors on the face of the decree, the rule requiring previous performance of the decree does not apply. *Davis v. Speiden*, 72.

18. Presumption of payment of mortgage from lapse of time may be raised by demurrer. Any circumstances which repel such presumption must be averred in the bill. *Olden v. Hubbard*, 72.

19. Pleas alleging conclusions of law, or which are not in accordance with the rules, may be disregarded. *Central Nat. Bank v. Conn. Mut. Life Ins. Co.*, 72.

20. The want of a replication cannot be assigned for error upon appeal after hearing on the merits. *Id.*

ERRORS AND APPEALS. See ADMIRALTY, 3, 4. BILLS OF REVIEW. EQUITY, 9, 20. HUSBAND AND WIFE, 9. JUDGMENT, 6, 8. JURY, 2. PATENT, 19. TRUST, 2.

1. Upon a joint bill filed by the owners of separate properties to restrain the collection of assessments against them, the jurisdiction of the appellate court depends upon the amount of the largest individual assessment and not upon the aggregate amount of such assessments. *Russell v. Stansell*, 483.

2. In a contest between the creditors of an estate, the jurisdiction of the appellate court is determined by the aggregate amount of the claims of creditors interested in the result of the litigation, and not by the amount of claims provable against the estate. *Chatfield v. Boyle*, 419.

3. A judgment of reversal is effective notwithstanding the death of the plaintiff in error during the pendency of the proceedings in error. *Williams v. Englebrecht*, 419.

4. Record cannot be returned in admiralty case to supply omission of finding of fact unless such omission was the fault of the court. *Winslow v. Wilcox*, 72.

5. It is not a valid objection to an appeal from a District Court of the United States to a Circuit Court that the former court allowed it without writing, in violation of a rule of that court. *Winslow v. Wilcox*, 810.

6. Nor will a rule that the appeal and record should be delivered to the Circuit Court in twenty days, prevent the latter court from entertaining the appeal, although the rule is not complied with. *Id.*

7. A cross-appeal must be prosecuted as if no other appeal was pending. *Id.*

8. On appeal from a District to a Circuit Court of the United States, the district judge cannot vote, and therefore the case cannot be brought to the Supreme Court on a certificate of division of opinion. *United States v. Emholt*, 810.

9. An information for a forfeiture under the internal revenue laws cannot be brought from the Circuit to the Supreme Court. *Id.*

10. Under sect. 693 Rev. Stat., final judgments of Circuit Courts in civil actions where there has been a division of opinion of the judges are only reviewable on writ of error or appeal. The Act of 1802 was suspended by the Act of July 1st 1872. *Banking House v. Trustees*, 72.

11. An appeal lies from a decree in equity for costs where they are directed to be paid out of a fund in the control of the court. *Trustees of Int. Imp. Fund v. Greenough*, 681.

12. Where a municipal ordinance prohibits that which is a crime or misdemeanor at common law, and prescribes a penalty by fine with imprisonment on default of payment, an action to recover such penalty is *quasi* criminal, and no appeal lies. *President, &c., of Plattsville v. McKernan*, 618.

13. Where the evidence tends to make out the plaintiff's case, its effect is for the jury, and the appellate court will not review or weigh it. *Cuddy v. Horn*, 302.

14. An appeal from a final decree brings before the appellate court all interlocutory orders involving the merits. *Clair v. Terhune*, 618.

15. On appeal from the final decree, the appellate court will decide whether a decree of reference, prescribing the limits of the accounting, be right. But items clearly within the limits of the reference, not allowed by the master,

ERRORS AND APPEALS.

where exceptions to the report have not been filed, will not be considered. *Clair v. Terhune*, 618.

16. The limitation of two years prescribed by sect. 1008 Rev. Stat., applies to writs of error to state courts. *Cummings v. Jones*, 345.

17. A reversal will not be granted because the verdict was only one-half what it should have been if any recovery at all was had. *Alderman v. Cox*, 345.

18. An error in admitting the evidence of an incompetent witness in a chancery case is no ground of reversal when the record contains other evidence which is competent and sufficient. *Ritter v. Schenck*, 270.

19. On error to reverse a judgment in damages for breach of contract where the damages are excessive, the court may, in certain cases, affirm the judgment upon a remittitur of the excess being filed. *C. & M. Railroad Co. v. Hinrod Furnace Co.*, 270.

20. The erroneous sustaining of a demurrer to a replication to one of several defences in the answer, requires the reversal of a final judgment for the defendant which is not clearly shown by the record to have proceeded upon other grounds. *Moores v. Citizens' Nat. Bank*, 345.

ESTOPPEL. See **ACKNOWLEDGMENT**, 3. **AGENT**, 1. **BILLS AND NOTES**, 5. **INSURANCE**, 8. **MASTER AND SERVANT**, 4. **MORTGAGE**, 13, 18. **PLEDGE**, 1. **RECEIVER**, 7. **SHERIFF'S SALE**, 4.

1. An admission of indebtedness by the garnishee to the attaching creditor prior to the attachment does not estop him from afterwards denying such indebtedness although it is evidence against him. *Warder v. Baker*, 419.

2. The customer of a stock broker admitting that he never intended to pay for stock bought is estopped from complaining of want of notice of the sale of the stock. *Van Horn v. Gilbough*, 171.

EVIDENCE. See **ACKNOWLEDGMENT**, 4. **ADVANCEMENT**. **ASSUMPSIT**. **BILLS AND NOTES**, 8, 17. **CONTRACT**, 3, 7. **COPYRIGHT**. **CRIMINAL LAW**, 1, 3, 6, 11-13, 27, 28, 30, 31. **CUSTOM**, 3. **DAMAGES**, 7. **DEED**, 6, 10. **ESTOPPEL**, 1. **EXECUTION**, 2. **HUSBAND AND WIFE**, 20. **LIMITATIONS, STATUTE OF**, 6. **MALICIOUS PROSECUTION**, 13. **MORTGAGE**, 3. **MUNICIPAL CORPORATION**, 9. **NAME**. **PARENT AND CHILD**, 3. **PARTNERSHIP**, 7, 25. **PAYMENT**, 1. **SALE**, 13. **TELEGRAPH**, 1-3. **UNITED STATES COURTS**, 1. **WILL**, 9, 14. **WITNESS**.

1. When a contract is executed in duplicate, both copies are originals, and one may be offered without notice to produce the other. *Totten v. Lucy*, 484.

2. A merchant's account-book was offered in evidence; it appeared that the memorandum of sales was made as they took place, on a little pass-book or blotter; that at the close of each day, or at most with a delay of but a day or two, these memoranda were copied into the journal or account-book offered in evidence; it also appeared that these pass-books or blotters had been lost or destroyed, and the party who made the copies in the account-book testified that they were correct. *Held*, no error in admitting such book of account. *Rice v. Simpson*, 137.

3. Where a written contract is susceptible of two constructions, one fair and reasonable, and the other so highly favorable to the party preparing the writing that it was not likely to be knowingly accepted by the other party, parol testimony is admissible of the prior negotiations and the situation and admissions of the parties. *Muson v. Ryms*, 136.

4. A written contract purporting to contain the whole contract cannot be varied or amplified by parol evidence. *Heil v. Heller*, 202.

5. A return to a writ of replevin that the goods were found in the town of H. is not evidence that they were found there. *Parker v. Palmer*, 202.

6. A note of the ancestor is not admissible in a suit revived against the heirs without proof of its execution. *Davis v. Smith*, 159.

7. In suit for damages for personal injury, evidence of an attempt by defendant to corruptly influence one of plaintiff's witnesses is admissible. *Chicago City Railway Co. v. McMahon*, 681.

8. Parol evidence admissible to show that because of the fraud of a party to

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an instrument it does not express the real agreement. *Hopkins v. Hawkeye Ins. Co.*, 748.

9. Contract created by endorsement of note cannot be varied by parol proof. *Martin v. Cole*, 73.

10. The law of a sister state is a question of fact to be proved by evidence. In the absence of such evidence it will be presumed that the common law is in force. *Meyer v. McCabe*, 70.

11. Parol evidence admissible to show that mortgage has been discharged or to explain or contradict the consideration clause. *Baile v. St. Joseph F. & M. Ins. Co.*, 37.

12. An original *fi. fa.* may be taken out of court and used in evidence. *Thomas v. Parker*, 811.

13. A *fi. fa.* from a federal court will be recognised by the state courts without other than intrinsic proof. *Id.*

14. Whether a witness is qualified to testify as an expert is a preliminary question for the judge, whose decision is conclusive, unless it appears upon the evidence to have been erroneous. *Perkins v. Stickney*, 816.

15. A treasurer of a mill corporation, whose only knowledge of the quality of the coal burned in his mill is derived from the weekly reports of his engineer, is not qualified as an expert to testify as to such quality, although he has bought all the coal used in the mill for several years. *Id.*

16. The court will take judicial notice of the county in which an incorporated town is situated, and of the fact whether such county is under township organization. *People v. Suppiger*, 681.

17. The printed journals of the legislature, published by legal authority, are competent evidence of legislative proceedings. *Amoskeag Nat. Bank v. Ottawa*, 681.

18. Portions of medical books cannot be read as evidence, although such books be shown by expert testimony to be standard works. *Stilling v. Town of Thorp*, 619.

19. Non-experts must state grounds and facts sufficient to justify the expression of an opinion. *Kerby v. Kerby*, 484.

20. Persons in the service of one alleged to be infirm in mind, and constantly about such person, and having business dealings with him, are competent to express an opinion respecting his mental condition. *Id.*

21. **EXPERT TESTIMONY—SCIENTIFIC TESTIMONY IN THE EXAMINATION OF WRITTEN DOCUMENTS, ILLUSTRATED BY THE WHITTAKER CASE, &c.**, 425, 489.

EXECUTION. See **EVIDENCE**, 12. **INJUNCTION**, 3, 4. **PARTNERSHIP**, 2, 4. **SHERIFF'S SALE**.

1. Property levied upon by a constable under a valid execution is not subject to levy by any other officer. *Jones S. & P. Co. v. Case*, 138.

2. A levy on real estate undisposed of is not *prima facie* evidence of satisfaction. *Overby v. Hart*, 345.

3. That a *fi. fa.* has been levied on land, a claim interposed and dismissed and the *fi. fa.* ordered to proceed, will not prevent a levy on other realty or require the *fi. fa.* to proceed on the original levy. *Id.*

4. To make a valid levy the officer must do such acts as that but for the protection of the writ he would be liable in trespass. *Rix v. Silkmitter*, 751.

5. The sheriff sells only the title of defendant and the real owner may maintain replevin or trover against the sheriff's vendee. *Reichenbach v. McKean*, 619.

6. A pledge may be sold on execution against the pawnor, but the sheriff's vendee takes subject to the lien of the pawnee. *Id.*

7. Exemptions must be strictly construed. *Pitard v. Carey*, 546.

8. One who does work on a public building under a contract is not an officer within a statutory exemption of the salary of an officer. *Id.*

EXECUTORS AND ADMINISTRATORS. See **ATTACHMENT**, 2. **CORPSE**. **GIFT**, 1. **JUDICIAL SALE**, 1. **NOTICE**, 2. **SURETY**, 6-8. **WILL**, 7, 22.

1. Where an administrator uses the funds of the estate, rendering no account thereof, he is chargeable with compound interest, and the failure to account raises a presumption of such use. *Camp's Creditors v. Camp's Administrators*, 484.

EXECUTORS AND ADMINISTRATORS.

2. An administrator may rightfully become the purchaser of the land of his intestate at a tax sale. *Stark v. Prown*, 270.

3. An executor who collects a large amount of money without his co-executor's knowledge, and gives a mortgage of his own lands to secure it, is not, by giving such mortgage, exonerated from liability to his co-executor. *Storms v. Quackenbush*, 138.

4. An administrator who signs a note describing himself as administrator, becomes, in the absence of an express stipulation to the contrary, personally liable. *Studebaker Bros. Man. Co. v. Montgomery*, 345.

5. Where a legacy is to be invested and not paid until the majority of the legatee, it is the duty of the executor to compound the interest by investing it as received. *Perrine v. Petty*, 138.

6. An executor who lends such fund to his co-executor on inadequate security, is liable for compound interest, and the fact that such investment is stated in his account in the Orphans' Court will not relieve him. *Id.*

7. Where an administrator deposits funds of the estate in his own name in bank, he is liable for a loss by the bank's failure, even though at the time of the deposit he informed the officers that the moneys were held in trust. *Williams v. Williams*, 619.

8. A power of sale does not authorize an executrix to mortgage the estate. *Gillespie v. Murphy*, 752.

9. An executrix cannot borrow money and charge the estate, and if she renews notes of the testator she makes them her personal obligations. *Id.*

10. But she may prove as creditor for sums borrowed and used for the estate, and the lenders may by cross bill be subrogated to her rights. *Id.*

11. Where on an administrator's account credit for a payment is disallowed, he is liable for interest on such sums from the date of payment. *Mount v. Van Nees*, 811.

12. That an executor fails to record a mortgage that had been given by him to the testator, and also claims credits which appear to be false, are sufficient grounds for requiring him to give security. *Bird v. Wiggins*, 811.

13. Upon an application to assess the damages on a judgment recovered against an administrator and his sureties, because of his failure to apply to the payment of the intestate's debts the proceeds of lands sold under an order of the Orphans' Court, *Held*, That as the administrator had authority to sell only the lands specified in the order of the Orphans' Court, his sureties are not liable for the proceeds of sale of any other lands, and that there can be no deduction in the administrator's favor because of his failure to exhaust the personal estate of the intestate in payment of his debts before applying the proceeds of the realty thereto. *In re Givens's Adm'r*, 138.

EXEMPTION. See EXECUTION, 7, 8. TAXATION, 18.

EXPERT. See EVIDENCE, 14, 15, 21.

EXPRESS COMPANY.

A foreign railroad company doing an express business is liable to a privilege tax imposed by a state upon express companies. *Memphis and Little Rock Railroad Co. v. State*, 752.

FENCE. See CRIMINAL LAW, 32.

FIXTURE. See CRIMINAL LAW, 25.

1. When actually or constructively annexed after the execution of a mortgage, fixtures cannot be removed without the consent of the mortgagee. *Wight v. Gray*, 484.

2. As between vendor and vendee the rule for determining what is a fixture, is construed strongly against the vendor. *Pratt v. Whittier*, 49.

3. Character of chattels attached to the freehold depends upon the agreement of the parties. *Id.*

4. Gas fixtures, range, tank, filter, window screens, &c., held upon the construction of a contract of sale to pass to the vendee as part of the realty. *Id.*

5. Character of gas fixtures, stoves and furnaces, &c. *Id.*, note.

FOREIGN ATTACHMENT. See ATTACHMENT, 6.

FOREIGN JUDGMENT. See ATTACHMENT, 10. HUSBAND AND WIFE, 3.

FORFEITURE. See INSURANCE, 1-6. MASTER AND SERVANT, 2.

FORMER ADJUDICATION. See TAX, 4.

1. A suit brought after the maturity of a note to recover an instalment of interest and a recovery therein, is no bar to a subsequent action to recover the principal. *Dulaney v. Payne*, 270.

2. One not a party to an action, not notified of its tendency, having no opportunity to control the defence or take a writ of error, is not bound by the judgment. *Hale v. Finch*, 202.

3. The fact that a note stipulates that the principal shall become due on default in any payment of interest, will not in case of such default merge the interest with the principal, and a recovery in a suit for the interest will not bar a suit for interest subsequently accrued. *Wehrly v. Morfoot*, 682.

FRAUD. See ATTACHMENT, 12. CORPORATION, 15, 17. DEBTOR AND CREDITOR, 1-16, 22. LUNATIC, 5. PARTNERSHIP, 14. SALE, 12.

1. An action may be maintained by the buyer of a patent right against the seller for a false representation as to novelty, although by searching the records of the Patent Office the buyer might have discovered the fraud. *McKee v. Eaton*, 139.

2. Where the value of property depends upon future contingencies or developments, no action will lie for an expression of opinion as to it, however fallacious. *Gordon v. Butler*, 752.

3. *Semble*. For a false expression of opinion as to matters capable of accurate estimation, or by a person having special learning upon the subject, an action will lie. *Id*.

FRAUDS, STATUTE OF. See SPECIFIC PERFORMANCE, 6. TELEGRAPH, 4.

1. An agreement by the owner of a vessel to pay a lien thereon, for a debt incurred by a former owner, is not a promise to pay the debt of another within the statute. *Fears v. Story*, 271.

2. A guaranty by a debtor of the note of a third person given to his creditor, in payment of his debt, is not within the Statute of Frauds. *Eagle M. and R. Mach. Co. v. Shattuck*, 202.

3. If, upon the close of a partnership, one partner takes to his own use a portion of the assets whether choses in action or anything else, on an oral agreement to account to his co-partners for a definite share, the agreement is not within the statute. *Conger v. Cotton*, 423.

4. Where one agrees to satisfy his obligation to an estate, by distributing the sum he holds among its creditors, such agreement is not a promise to pay the debt of another within the statute. *Decuir v. Ferrier*, 139.

5. A verbal promise in the alternative to compensate a party by will, either in land or money, is within the statute. *Howard v. Brower*, 139.

6. Where the agreement sued on is within the statute, and it is fairly to be inferred from the petition that it is not in writing, the defence of the statute is available on demurrer. *Id*.

7. When a conveyance in trust is made voluntarily, and the only fraud alleged is in repudiating the agreement, it will not remove the case from the operation of the statute. *McClain v. McClain*, 811.

8. Where the terms of an agreement are evidenced by a writing sufficient to satisfy the statute, it will be binding notwithstanding the fact that the writing was intended only as instructions for a formal agreement to be prepared and signed. *Wharton v. Stoutenburgh*, 619.

9. August 20th an oral contract was made between A. and B., by which A. was to enter B.'s service for one year, A. to begin the term of service as soon as he could. A. began work August 27th. *Held*, that the contract was within the Statute of Frauds, being an oral contract not to be performed within a year. *Sutcliffe v. Atlantic Mills*, 546.

GARNISHMENT. See ATTACHMENT.

GIFT. See GUARDIAN AND WARD, 6.

1. Where stock stood in a testator's name on the books of the corporation, the facts that the certificate is found in the executor's possession and that the

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testator gave him a power of attorney to receive and assign any dividend, are not conclusive evidence of a gift of the stock to the executor. *Smith v. Burnett*, 139.

2. The making of a deposit in a savings bank in the name of another without surrendering the book or the control of the fund, does not make the depositor a trustee for the person in whose name the deposit was made. *Northrop v. Hale*, 420.

3. A gift from a lady to her medical adviser is voidable only and may be ratified by the intentional adherence of the donor to it after the termination of the relation. *Mitchell v. Homfray*, 871.

4. Gifts by persons in confidential relations. *Id.*, note.

5. Property delivered to an agent with directions to deliver it to another in case of death, but to return it in case of recovery, is not a valid *donatio causa mortis*. *Walter v. Ford*, 684.

6. Whether a bank check can be the subject of a *donatio causa mortis*, *quare*. *Id.*

GUARANTY. See **BILLS AND NOTES**, 11, 21. **CONTRACT**, 11. **CORPORATION**, 17. **FRAUDS**, **STATUTE OF**, 2.

1. Notice of acceptance of guaranty is not necessary where it is made at the request of the creditor or for a valuable consideration, or is in form a bilateral contract. *Davis v. Wells*, 73.

2. Where a guaranty declares that the guarantor guarantees unconditionally at all times any advances, &c., to a third person, notice of demand of payment and the default of the debtor is waived, as well as notice of the amount of the advances. *Id.*

3. But a failure to give such notice, if required, would be a defence only to the amount of the damage actually caused. *Id.*

4. Contracts of guaranty are to be liberally construed. *Id.*

GUARDIAN AND WARD. See **EQUITY**, 12. **MUNICIPAL BONDS**, 4.

1. Where a guardian, who was also the father of the ward, never made any charge for maintenance, his sureties are not entitled to allowance therefor in a suit on the bond. *In re Walling*, 812.

2. The ward's omission to sue the surety for nine years after coming of age will not prevent his recovery. *Id.*

3. The approval of the probate court is not essential to the validity of a lease by a guardian. *Field v. Merrick*, 203.

4. A full settlement between guardian and ward, after the latter becomes of age, acquiesced in for more than four years, is *prima facie* binding. *Steadham v. Sims*, 346.

5. While the guardian should inform the ward of the condition of the estate, it is not necessary in all cases that he should make a detailed statement of the receipts, expenditures, debts, &c. *Id.*

6. The gift from a ward to the guardian is voidable, and the burden of proof is on the latter to show that it was freely and voluntarily made, and that the donor had competent and disinterested advice. *Wade v. Pulsifer*, 682.

7. The settlement of the guardian's account; the presence of the wards; their receipts; their expression of approval; their declarations that they did not regret the gifts; lapse of time; the death of the donee, and one of the donors, do not affect the result. *Id.*

HABEAS CORPUS.

1. An allegation that children are concealed by respondents in one or the other of two counties, is sufficient to give the courts of one of the counties jurisdiction, and it is no excuse to return that the children are in the other county, unless it is also alleged that they are beyond respondent's power. *Rivers v. Mitchell*, 812.

2. A prisoner under sentence of a court martial cannot be discharged under habeas corpus if the court martial had jurisdiction, and the sentence was one which it had power to pronounce. *Ex parte Mason*, 812.

HIGHWAY. See **CONSTITUTIONAL LAW**, 23, 24. **MUNICIPAL CORPORATION**, 7. **NUISANCE**. **SHERIFF**, 5.

HOMESTEAD.

Lien on a crop by a factor furnishing supplies is superior to the homestead right of the debtor's wife. *Cook v. Roberts*, 812.

HUSBAND AND WIFE. See ACKNOWLEDGMENT, 4. ATTORNEY, 3. CRIMINAL LAW, 7, 8, 13. LIMITATIONS, STATUTE OF, 10.**I. Marriage, Divorce and Alimony.**

1. A statute prohibiting the guilty party from marrying after divorce has no extra-territorial effect, and the marriage of such party in another state is valid though made there to evade the prohibitory law. *Van Voorhis v. Brinnall*, 9, and note.

2. So much of a decree in divorce against a person not residing within the jurisdiction of the court as provides that such person shall not marry again is invalid. *Garner v. Garner*, 346.

3. The courts of a state in which a marriage valid by its laws is contracted between subjects of foreign states will give effect to a subsequent decree of the court of the foreign state of which the husband was a subject, annulling the marriage on the ground that it had been contracted without the consent of the sovereign of such foreign state, it appearing that at the time of the decree of nullity both parties had returned to such foreign state and were within the jurisdiction of the court pronouncing the decree. *Roth v. Elman*, 589, and note.

4. A decree of divorce may be re-opened during the term at which it was entered, but will not be re-opened at the request of a respondent who has been guilty of delay or false pleading. *Mumford v. Mumford*, 203.

5. Divorced wife can maintain action against former husband for services performed before their marriage. *Carlton v. Carlton*, 74.

6. A decree vesting in the wife specific personal property of the husband as alimony is valid, at least when made in pursuance of an agreement of the parties. *Creus v. Mooney*, 346.

7. Such decree cannot be avoided in a collateral action. *Id.*

8. Courts of chancery may decree *ad interim* alimony, and enforce it by all the means by which courts usually compel obedience, and if there be cross complaints they may dismiss his for disobedience to such decree, and allow the other to be prosecuted. *Casteel v. Casteel*, 752.

9. An appeal from an order for *ad interim* alimony may be taken immediately. *Id.*

10. Alimony should not be declared a lien on the husband's lands. *Id.*

II. Curtesy and Dower.

11. The burden of proof is upon the heirs who allege an ante-nuptial agreement debarring the husband from a share of his wife's estate to show such agreement and that it was in force at the wife's death. *Graves v. Wakefield*, 682.

12. The presumption as to the continued existence of such agreement from the fact that it once existed is overcome by the fact that it is not found among her papers. *Id.*

13. A married woman may surrender an ante-nuptial agreement to her husband to be cancelled. *Id.*

III. Separate Estate. See *infra*, 21-23.

14. A sum of money was paid to a husband and wife, and in consideration thereof they covenanted to support and maintain one X. during her life. *Held*, that the wife's interest in the sum so paid is her separate estate, and that she was liable upon the covenant as well as her husband. *Houghton v. Milburn*, 619.

15. Where, by the terms of a jointure, the husband was to account to the wife for the income of her separate estate, but failed to do so, his representative, after his decease, is liable to account therefor with interest calculated with yearly rests. *Middaugh v. Trimmer*, 74.

16. Widow may reclaim from her husband's estate her separate money loaned to him and applied to the payment of a mortgage on lands owned by them as husband and wife. *Greiner v. Greiner*, 812.

HUSBAND AND WIFE.

IV. *Contracts, Conveyances, &c.* See *ante*, 13, 14, 16.

17. Wife may mortgage her land to secure the debt of her husband or of any other person. *Merchant v. Thompson*, 74.

18. A warrant of attorney by the wife to confess judgment is valid if the contract to enforce which it is given is one which she is legally capable of making. *Heywood v. Shreve*, 683.

19. If a husband uses the money of his wife, and thereby acquires title to property, *bona fide* purchasers from him will be protected. *Gorman v. Wood*, 346.

20. Parol evidence is admissible to identify the debt of a husband for which a mortgage was given by the wife. *Hall v. Tay*, 346.

21. A married woman is not personally liable on her contract though possessing a separate estate, and a suit is not maintainable thereon against her personal representatives. *Davis v. Smith*, 159.

22. Her separate estate ceases to be such upon her death, and her general creditors are entitled to share in its distribution. *Id.*

23. A suit to charge such estate may be revived against her heirs. *Id.*

24. Liability of married woman on contracts. *Id.*, note.

25. An insane husband of full age is under the control of his wife, and it is not trespass for her to enter his father's house and remove him. *Robinson v. Frost*, 682.

26. Action for slander of wife must be brought by husband and wife jointly, and the claim for damages must be joint. *Newcomer v. Kean*, 484.

27. Where a sale from husband to wife is attacked the burden is on the wife, or on a purchaser from her with notice to show *bona fides* and consideration, and a mere recital of a valuable consideration in the bill of sale will not support a verdict in her favor. *Horton v. Dewey*, 203.

ICE. See WATERS AND WATERCOURSES, 1, 2, 4.

INCUMBRANCE. See MORTGAGE.

INDICTMENT. See CRIMINAL LAW, 19, 22. LIBEL, 2.

INFANT. See EQUITY, 12, 13. GUARDIAN AND WARD. MUNICIPAL BONDS, 4. PARENT AND CHILD.

1. May, during minority, rescind sale of his goods upon tender of the consideration received, and may bring trover therefor, and such tender and the demand for the goods may be made by an agent appointed by the infant. *Towle v. Dresser*, 485.

2. No action lies to recover a minor's wages earned in violation of a statute prohibiting the employment of minors in certain cases. *Birkett v. Chatterton*, 136.

INJUNCTION. See ACTION, 2. CONSTITUTIONAL LAW, 3, 4, 23. EQUITY, 6, 8. TRADEMARK, 4, 6.

1. Will not be granted to restrain the use of land by an unlawful occupant simply because such use, although not forbidden by law, is alleged by complainant to be immoral and mischievous and calculated to injure his reputation in the community. *Bohwell v. Crawford*, 139.

2. A mortgagor who mortgages an embarrassed title or whose title becomes clouded, is not entitled to an injunction against foreclosure proceedings because the property will not bring full value. *Am. Dock and Imp. Co. v. Trustees of Public Schools*, 620.

3. A court of equity will not enjoin a sale of lands under an execution against one person merely because the title to the land is claimed by another, unless the case is one of fraud or irreparable injury. *Id.*

4. Allegation that judgment-creditor of complainant's grantor has seized and is about to sell complainant's lands is no ground for an injunction. *Sheldon v. Stokes*, 74.

INSANITY. See LUNATIC.

INSOLVENCY. See CORPORATION, 26, 27.

Where a note is allowed against the estate of an insolvent surety, and afterwards a dividend is paid on it by the estate of the insolvent principal, the

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owner of the note is entitled to a dividend from the estate of the surety only on the balance, and not on the amount first allowed. *Lowell v. French*, 683.

INSURANCE.

I. Marine. See ADMIRALTY, 6.

II. Life.

1. Equity will not relieve against forfeiture for non-payment of premium, even though such non-payment be caused by the derangement of the mind of the insured through illness, and the ignorance of the beneficiary of the existence of the policy. *Klein v. New York Life Ins. Co.*, 74.

2. The courts will not relieve against a forfeiture for non-payment of premiums which is stipulated for in the policy or in the premium note. *Thompson v. Knickerbocker Life Ins. Co.*, 271.

3. Neither a usage of the company to give notice, nor a usage to give days of grace, will avail as a defence in case of non-payment for want of such notice. *Id.*

4. Even if there is ground for relief against the forfeiture, such relief will not be granted unless there had been a subsequent tender of the premiums due. *Id.*

5. The policy cannot be contradicted by proof of a cotemporaneous parol agreement. *Id.*

6. Where one travels beyond the limits assigned by the policy and dies, a permit subsequently given by a local agent in ignorance of the death, is not a waiver of the forfeiture. *Bennecke v. Conn. Mut. Ins. Co.*, 420.

7. If the ordinary habits of the insured were temperate, the fact that he had been attacked by delirium tremens from an exceptional over indulgence, will not render untrue an answer in his application to the effect that he was, and had always been, of temperate habits. *Knickerbocker Life Ins. Co. v. Foley*, 620.

8. A stipulation that if a policy should become void for any cause it should not be revived by the issue of a renewal receipt, may be waived by an agent, and the insurer, after receiving the premium and issuing the renewal receipt, is estopped to deny the contract. *Shafer v. Phoenix Ins. Co.*, 140.

9. If a policy insures the life of A. for the use of B., A. cannot maintain an action against the insurer for the premiums paid, although the policy never took effect by reason of fraud by the insurer's agents. *Trabandt v. Conn. Mut. Life Ins. Co.*, 347.

10. Where a policy in the name of a wife on the life of her husband is payable to the wife if she survive her husband, and if she does not, then to her children, the children are in the latter event the sole beneficiaries, and an adopted child may take where the circumstances show such an intent. *Martin v. Aetna Life Ins. Co.*, 485.

11. An assignment of a policy for moneys advanced by the assignee, is valid only to the extent of such advances, and the assignee must account to the representatives of the assignor for the balance. *Warnock v. Davis*, 346.

12. Where a certificate of membership in a mutual company provided for an assessment on the members, and payment of the sum collected within a certain time after notice of death, a declaration containing no allegation of a neglect to make the assessment and assigning no breach except of a promise to pay is fatally defective, and such defect is not cured by a verdict. *Curtis v. Mut. Ben. Life Ins. Co.*, 203.

13. A corporation for the mutual protection and relief of its members, and for the payment of stipulated sums to the families of deceased members, belongs to the class of corporations formed for purposes other than for profit. *Ohio v. Standard Life Association*, 620.

14. A certificate of membership in such a corporation by which the corporation in consideration of the payment by a member of a membership fee, annual dues and a pro rata assessment with his fellow members to pay a sum of money to the family of a deceased member, stipulates to pay at his death to his family a sum of money, graduated by the number of members in his class, is a contract of life insurance. *Id.*

15. Such a contract to pay in case of a member's death "to himself or

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assignees," "to his estate," "to his executors or administrators," or to any person, whether a relation or not, who is not of his family or heirs, is against public policy, and void. *Ohio v. Standard Life Association*, 620.

III. Fire.

16. A verbal agreement to insure is binding. *Baile v. St. Joseph F. & M. Ins. Co.*, 37, and note.

17. The only element of a valid contract wanting in such an agreement was the nature of the risk. *Held*, That this might be inferred from the business of the insurance company and the subject-matter of the insurance. *Id.*

18. Specific performance of such an agreement may be enforced after loss, by decreeing payment of the money. *Id.*

19. The violation of conditions which would have been contained in the policy if issued, is no defence to such agreement. *Id.*

20. Verbal assent of agent to additional insurance sufficient, though the policy stipulates for endorsement of written consent. *Id.*

21. Company refusing to pay on other grounds cannot defend on ground of delay in furnishing proofs. *Id.*

22. Insured may sue in his own name although the loss was payable to a third person, if such third person consents to the suit. *Coates v. Penna. Fire Ins. Co.*, 747.

23. Where after the making of a contract of sale of a house, but before completion of the purchase, the house is damaged by fire and the vendor receives the insurance money, the vendee is neither entitled to the insurance money nor to reinstatement of the premises. *Rayner v. Preston*, 89, and note.

24. Furniture in a fire policy was described as "11 contained in house No. —, McMillen street." The insured, without the insurer's knowledge, removed the furniture to a house in another street, where they were consumed. *Held*, that the insured could recover on the policy. *Lyons v. Providence Washington Fire Co.*, 139.

25. A condition in a policy that any one insuring in the company must give notice of other insurance, is not restricted to other insurance effected prior to the execution of the policy. *Warwick v. Monmouth Co. Fire Ins. Co.*, 683.

26. Where there are two policies, each containing a condition rendering the policy void in case of other insurance, the second policy does not invalidate the first. *Jersey City Ins. Co. v. Nichol*, 620.

27. The second policy being void, there is no fraud in the statement in a proof of loss under the first, that there is no other insurance. *Id.*

INTEREST. See **BILLS AND NOTES**, 5. **CONSTITUTIONAL LAW**, 2. **CONTRACT**, 5. **CORPORATION**, 10. **EXECUTOR**, 1, 5, 6, 11. **FORMER ADJUDICATION**, 1, 3. **HUSBAND AND WIFE**, 15. **NATIONAL BANK**, 2. **TRUST**, 1. **USURY**.

INTERPLEADER. See **WILL**, 7.

INTOXICATING LIQUORS. See **CONSTITUTIONAL LAW**, 8, 16.

A statute providing that "evidence of the sale or keeping of intoxicating liquors for sale in any building, place or tenement, shall be *prima facie* evidence that the sale or keeping is illegal," is not unconstitutional. *State v. Higgins*, 140.

INTOXICATION. See **CRIMINAL LAW**, 31.

JOINTURE. See **HUSBAND AND WIFE**, 15.

JUDGMENT. See **CONFLICT OF LAWS**, 2. **EQUITY**, 1. **FORMER ADJUDICATION**, 2. **HUSBAND AND WIFE**, 18. **MUNICIPAL CORPORATION**, 2. **POSSESSION**, 2. **PRACTICE**, 2. **SET-OFF**, 1.

1. Is beyond the control of the court after the term at which it was rendered except as to certain mistakes of fact formerly remedied by writ of error *coram vobis* but now remedied by motion. *Bronson v. Schulten*, 347.

2. Neither the state statutes nor the practice of the state courts can control the United States courts in this respect. *Id.*

JUDGMENT.

3. Negligence and laches of the party in discovering the mistake will bar his right to relief. *Bronson v. Schutten*, 347.

4. Judgment for costs cannot, at a subsequent term, be modified so as to be enforced against the equitable instead of the legal plaintiff. *Boland v. Benson*, 621.

5. A judgment of revival does not validate or otherwise alter the nature or effect of the original judgment. *Weiller v. Blanks*, 547.

6. The fact that a plaintiff has appealed from a judgment in his favor, does not prevent him from suing for its revival; and such proceeding will not prejudice his rights on appeal. *Id.*

7. Judgments for money are prescribed by ten years from the date of their rendition: and the prescription runs from the date of the signing of the judgment by the inferior court, and not from that of its confirmation by the appellate tribunal. *Id.*

8. The pendency of an appeal by either party, even suspensive, does not stay the course of prescription against a judgment. *Id.*

9. The owner of a city lot is not bound by a judgment in a mandamus proceeding to compel councils to levy an assessment thereon, to which proceeding he was not a party. *Rork v. Smith*, 621.

JUDICIAL SALE. See MORTGAGE, 5. SHERIFF'S SALE. WILL, 22.

1. The doctrine of *caveat emptor* applies to an administrator's or executor's sale. *Jones v. Warnock*, 272.

2. A covenant of warranty enures to the benefit of a purchaser at a judicial sale. *Williams v. Berg*, 753.

JURISDICTION. See COURTS. EQUITY, 2, 5, 12. HUSBAND AND WIFE, 2.**JUROR AND JURY.** See CRIMINAL LAW, 9, 10. VERDICT, 1, 2.

1. Misconduct of jury may be shown in a civil case by affidavits of jurors, and if they refuse to give affidavits, they may be called and examined by the trial judge. *Whitmore v. Ball*, 742, and note.

2. For a refusal of the trial judge so to do, the appellate court will order a new trial. *Id.*

3. Where one respondent peremptorily challenges a juror, and the other desires him to sit, it is proper for the court to excuse him. *State v. Meaker*, 683.

4. An opinion to disqualify a juror must be more than a transitory inclination of the mind. It must be an abiding bias as to the guilt or innocence of the accused upon the evidence substantially as expected to be presented on the trial. *Id.*

JUSTICE OF THE PEACE. See CONTEMPT, 2.**LACHES.** See GUARDIAN AND WARD, 2. JUDGMENT, 3.**LANDLORD AND TENANT.** See WATERS AND WATERCOURSES, 9.

1. A Catholic priest, removable at the will of the bishop, is not a tenant of the parsonage, and is not entitled to the statutory notice to quit. *Chatard v. O'Donovan*, 461, and note.

2. A lessee is not released by the fact that a prior tenant whose term has expired holds over without right. *Field v. Herrick*, 203.

3. Where a lessee for years, who has covenanted to pay taxes, leases to another for the whole of his unexpired term by a lease which covenants to pay an increased rent, and the taxes with stipulations for entry for breach of covenant, this is a sub-lease and not an assignment, and the sub-lessee is not liable to the original lessor upon the covenant to pay taxes in the original lease. *Dunlap v. Bullard*, 347.

4. A reletting of the premises to the tenant after recovering a judgment of possession against him, is a satisfaction of the judgment. *Barney v. Cain*, 347.

5. The lien of a landlord will not be defeated by the conversion of the property of a tenant into money by a receiver under an order of court, but will attach to the proceeds in the receiver's hands. *Gilbert v. Greenbaum*, 547.

6. Where a landlord takes possession of and gins and bales a crop which has been mortgaged and then abandoned by the tenant, he may, as against the

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mortgagee, retain out of the proceeds the expense of preparing the crop for market as well as the rent. *Fry v. Ford*, 753.

LARCENY. See **CRIMINAL LAW**, 5.**LEASE.** See **GUARDIAN AND WARD**, 3. **LANDLORD AND TENANT.** **SALE**, 1, 3. **SPECIFIC PERFORMANCE**, 5, 6.**LEGACY.** See **EXECUTOR**, 5. **TAX**, 5. **WILL**, 1, 4, 7, 10, 11.

Is not to be considered a charge upon real estate unless the intention to charge it is expressly declared or fairly inferable from the will. *Owens v. Claytor*, 348.

LIBEL. See **ATTORNEY**, 7.

1. A publication is libellous if, without charging an indictable offence, it falsely and maliciously imputes conduct tending to injure reputation, to cause social degradation, or to excite public distrust, contempt or hatred. *State v. Spear*, 140.

2. An indictment for libel is good if it charges the publication of matter not libellous *per se*, but charges such publication with proper inducements and innuendoes to set forth and explain the defamatory statements of the publication. *Id.*

3. Whether words declared upon are libellous, is a question for the jury and not for the court. *Beazeley v. Reid*, 485.

4. An attorney is liable for a defamatory statement contained in a declaration in an action where such statement was not pertinent or material. *McLaughlin v. Cowley*, 272

LICENSE. See **CONSTITUTIONAL LAW**, 6. **MUNICIPAL CORPORATION**, 14. **PLEADING**, 1. **TRESPASS**, 2.**LIEN.** See **BAILMENT**, 3. **BANK**, 2. **HUSBAND AND WIFE**, 10. **MECHANIC'S LIEN.** **STOPPAGE IN TRANSITU.** **VENDOR AND VENDEE**, 1-5, 8.**LIFE TENANT.**

1. Is entitled to dividends on stocks, even if they are extraordinarily large, if they are intended by the corporation as a distribution of income. *Millen v. Guerrard*, 381.

2. Respective rights of life-tenant and remainderman in stock. *Id.*, note.

LIMITATIONS, STATUTE OF. See **CONSTITUTIONAL LAW**, 1. **UNITED STATES COURTS**, 3. **VENDOR AND VENDEE**, 4.

1. A promise to pay "as soon as possible" a debt already barred by the statute, will remove the bar. *Norton v. Shepard*, 204.

2. The mere addition of a seal to a promissory note will not prevent it from being barred by the statute unless the fact of its being a sealed instrument is recited in the body of the note. *Chambers v. Kingsbury*, 343; *Skrine v. Lewis*, 480.

3. A note and mortgage barred by the statute may be revived by an admission of indebtedness by the mortgagors, and the priority of the lien will be preserved as against liens taken before the mortgage became barred, and not foreclosed until it is revived. *Kerdt v. Porterfield*, 548.

4. Payment by a principal debtor which will take a case out of the statute as to him, will have the same effect as to his surety who is present. *Glick v. Crist*, 140.

5. A clear and unequivocal admission of a debt will take it out of the operation of the statute, without an express promise, but the admission must be so distinct as to remove hesitation as to the debtor's meaning. *Pulmer v. Gillespie*, 621.

6. In action against one of two joint makers of a note evidence is admissible of part payment by co-maker, since deceased, and of admissions of the maker sued. *Burgoon v. Bizler*, 75.

7. Where collateral is given for several notes the proceeds of such collateral should, in the absence of any special direction, be applied as a partial payment on each note, and thus prevent the running of the statute as to all. *Taylor v. Foster*, 813.

LIMITATIONS, STATUTE OF.

8. Begins to run in favor of a fraudulent conveyance from the time the creditor had a right of action to test its validity. *Ramsey v. Quillen*, 753.

9. Adverse possession by fraudulent grantees will avail, although such grantees were members of the grantor's family. *Id.*

10. Occupation by husband and wife, where the legal title is in the wife, enures to her benefit. *Id.*

11. Commences to run against coupon attached to municipal bond from maturity of the coupon. *Town of Koshkonong v. Burton*, 548.

LIS PENDENS.

1. The doctrine of lis pendens cannot be extended to support a bill against third persons for the value of wood cut during proceedings involving the title to the land. *Gardner v. Peckham*, 264.

2. A purchaser of land is charged with notice of an action affecting the same from the time the petition is filed, although the action was not properly indexed, and the notice was not served until after the purchase. *Haverly v. Alcott*, 813.

LOAN. See CORPORATION, 10.

LOCAL ACTION. See ACTION, 3, 5.

LUNATIC. See HUSBAND AND WIFE, 5.

1. Not liable upon his accommodation endorsement of a promissory note even to a *bona fide* purchaser of the note without notice. *Wirebach v. First National Bank of Easton*, 29.

2. Extent of liability upon contracts. *Id.*, note.

3. Will be bound by reasonable contract made in the ordinary course of business with parties ignorant of the lunacy, and who cannot be placed in *statu quo*. *Abbott v. Creal*, 548.

4. Where a grantor in a deed labors under an insane delusion as to a particular person, and the deed is an act referable to that state of mind, the deed is void, and in such case the rule that the grantor must be proved to be insane or under undue influence at the very time the deed was executed, is inapplicable. *Jones v. Jones*, 666, and note.

5. It is sufficient to invalidate a deed executed for an inadequate consideration by a person of weak intellect, to show that the grantee held a situation of confidence with respect to him, and in such case the burden of proof to show consideration is on the grantee. *Id.*

MALICIOUS PROSECUTION.

1. In an action for false imprisonment proof of the circumstances of plaintiff's family, and of the filthy condition of the jail used for the imprisonment, is admissible upon the question of mental anguish, &c. *Fenelon v. Butts*, 141.

2. In such action statements of the attorney of defendant in reference to a second imprisonment of plaintiff then threatened, are admissible if such attorney was then acting for defendant or was a co-conspirator with him, or made the statements in his presence and with his assent. *Id.*

3. Proof of defendant's good faith is not admissible to mitigate compensatory damages, including those allowed for injury to the feelings. *Id.*

4. If a mortgage creditor contract with his debtor not to enforce his mortgage within a given time but subsequently does so, the latter has a right to sue for the actual injury without alleging malice or want of probable cause. *Juchter v. Boehm*, 272.

5. In case of malice or want of probable cause punitive damages may be added. *Id.*

6. In an action for the wrongful seizure of a tradesman's stock, profits which he was making may be considered by the jury in estimating the magnitude of the injury. *Id.*

7. If the defendant has acted in bad faith, or been stubbornly litigious, counsel fees may be proved and allowed as part of the damages. *Id.*

8. In an action for maliciously attaching plaintiff's goods if there was no probable cause the jury may presume malice. *Bozeman v. Shaw*, 348.

9. The advice of counsel is no protection if the prosecutor believed the

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prosecution would fail, and was actuated by a desire to injure the accused. *Sharpe v. Johnstone*, 576, and note.

10. Malice is not an inference of law from the want of probable cause, but may be inferred from the facts which go to establish want of probable cause. Such inference is for the court and not the jury. *Id.*

11. Separate damages may be recovered for an indictment after discharge by the committing magistrate, if procured by the prosecutor, but not if he was summoned as a witness without his procurement. *Id.*

12. Where there are two successive indictments for the same offence, but a trial on one only, they cannot be regarded as two separate prosecutions. *Id.*

13. Evidence of facts tending to show the guilt of plaintiff, although inadmissible to show probable cause, should be admitted as bearing on the question of actual guilt. *Newton v. Weaver*, §13.

14. In an action for malicious prosecution in bringing an action of trover the verdict in the trover case is not conclusive upon the question of actual guilt. *Id.*

15. Advice of counsel upon a full disclosure of facts is a good defence. *Id.*

16. If the plaintiff was in fact guilty of the crime charged no recovery can be had. *Purkhurst v. Mastellar*, 813.

17. Mental suffering and injury to feelings constitute elements of actual or compensatory damages. *Id.*

18. Exemplary damages may be allowed by way of punishment. *Id.*

19. **THE ACTION FOR THE MALICIOUS PROSECUTION OF A CIVIL SUIT**, 281, 353.

MANDAMUS. See **JUDGMENT**, 9. **MUNICIPAL BONDS**, 3

1. Will lie to compel a county treasurer to transfer to the state treasury the state's proportion of taxes collected by him. *Ohio v. Staley*, 621.

2. A petition showing the collection of such taxes is not defective for want of an averment that they remain in the county treasury. *Id.*

3. Any court having jurisdiction may by mandamus compel a municipal corporation to levy a tax to pay its debts, but only in the manner and to the extent of the power conferred on it by law. *State v. Rainey*, 480.

MARITIME LIEN. See **ADMIRALTY**, IV.**MARKET OVERT.** See **SET-OFF**, 2.**MARRIAGE.** See **DEED**, 8. **HUSBAND AND WIFE**, I.**MASTER AND SERVANT.** See **DAMAGES**, 5. **PARENT AND CHILD**, 1-3.

1. Where an employee, under a monthly employment, says to his employer that he desires to have his employment made more permanent, and thereupon a specified amount per year is agreed upon, a hiring for a year may be inferred. *Bascom v. Strillito*, 272.

2. A contract by an employee to give two weeks' notice or forfeit two weeks pay does not apply to a temporary absence, and while the employee may be discharged for such offence his pay cannot be forfeited. *Heber v. Flax Manuf. Co.*, 204.

3. Where a servant engages for a particular time and improperly leaves before that time, he cannot recover compensation for his services. *Hibbard v. Kirby*, 754.

4. An employer who continues an employee in his service after learning of negligence or misconduct on the part of the latter, is estopped from subsequently complaining of such negligence or misconduct. *Marshall v. Sims*, 141.

5. Where a servant operating machinery is, by reason of his youth and inexperience, not aware of the danger, it is the duty of the master to warn him, notwithstanding the existence of that which renders the machinery dangerous is known to the servant. *Dowling v. Allen*, 348.

6. A foreman in charge of a distinct piece of work in a large foundry is as to those under him a vice principal to their employer, notwithstanding that he is subordinate to a general foreman of the entire establishment. *Id.*

7. The rule that one riding in a conveyance has no action for an injury caused by the driver's negligence, does not apply to passengers in a public con-

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veyance, even though they have chartered the conveyance. *Cuddy v. Horn*, 302, and note.

8. A section foreman of a railroad is not a fellow servant with the switchman. *Hall v. Mo. Pac. Railroad Co.*, 485.

9. A section hand injured by the negligence of the section boss in running a "crank car" backwards, may maintain an action against the company. *Railroad Co. v. Nelson*, 76.

10. A railroad receiving from another railroad for transportation a car in apparently good condition, is not bound, for the protection of its employees, to apply the tests proper to be used in the original construction of the car. *Bulou v. C. & N. Railroad Co.*, 421.

11. A railway company is responsible for the act of its clerk in endeavoring to corruptly influence a witness in a case against the city. *Chicago City Railway Co. v. McMahon*, 684.

12. An employer is not liable for injuries resulting from the negligence of a contractor, although the employer may have known that the contractor was of bad character. *Dobson v. Iron Co.*, 76.

13. Whether a person in the performance of work for another is a servant or contractor, depends upon whether he represents the will of the principal in the management and details of the work. *Id.*

MECHANIC'S LIEN.

1. One employed for an indefinite time to direct the work in a mine, with authority to employ and discharge miners and purchase supplies, and who, in the performance of those duties did some manual labor, is entitled to a lien under a statute giving a lien to any person who should perform any work or labor upon any mine. *Flagstaff Silver Mining Co. v. Collins*, 141.

2. One who performs labor for a contractor in the erection of a building is entitled to a lien, although no express contract for payment was made. *Foerder v. Wesner*, 421.

3. The fact that a laborer also acted as overseer of other workmen will not defeat his right to a lien. *Id.*

4. A mechanic may be estopped by acts from asserting a lien, although he made no express promise not to assert such lien. *West v. Klotz*, 141.

5. Prices agreed upon between the contractor and a material man are not binding upon the owner, but are prima facie evidence of the market value. *Deardorff v. Everhart*, 348.

6. Declarations of the contractor are not evidence against the owner. *Id.*

7. A lien cannot be enforced for materials furnished to the contractor but not put into the building. *Id.*

8. **MECHANICS' LIEN ON PERSONAL PROPERTY**, 151, 209.

MESNE PROFITS. See EJECTMENT.**MINES AND MINING. See MECHANIC'S LIEN, 1. SPECIFIC PERFORMANCE,**

6. **UNITED STATES**, 2, 3.

1. Where the original locators of a mining claim who have neglected to perform the annual work required by the Act of Congress of May 10th 1872, resume such work before a re-location by other parties, such resumption will continue their claim until the end of the year in which the work was resumed. The Act of June 6th 1874, makes no change in this respect. *Bell v. Meagher*, 204.

2. A re-location by other parties during the year in which work is resumed gives the new parties no right to the possession, even though they remain in possession after the expiration of such year. *Id.*

3. In such case the original owners by a peaceable entry on their claim may secure a good right which will enable them to hold the claim as against such other parties. *Id.*

MINOR. See INFANT. GUARDIAN AND WARD. PARENT AND CHILD.**MISREPRESENTATION. See FRAUD, 1-3.****MORTGAGE. See ATTACHMENT, 8. DEBTOR AND CREDITOR, 10, 11. EQUITY, 18. EVIDENCE, 11. FIXTURES, 1. HUSBAND AND WIFE, 17, 20. INTERJUNCTION, 2. LANDLORD AND TENANT, 6. LIMITATIONS, STATUTE OF, 3.**

MORTGAGE.

PARTNERSHIP, 16. PAYMENT, 1. PLEDGE, 6. SALE, 1, 2. SUBROGATION, 2, 3. SURETY, 11. TROVER, 6.

I. Generally.

1. Where there is a public office for recording mortgages a failure to record will postpone the lien as to a subsequent bona fide mortgagee, even though such recording is not required by statute. *Neslin v. Wells*, 273.

2. An agreement by a purchaser to pay an existing mortgage debt as part of the consideration may be enforced by the mortgagee, but not if the conveyance in which such agreement is inserted is itself a mortgage. *Bassett v. Bradley*, 273.

3. The items of indebtedness need not be stated in a mortgage if the total amount is named, and in the absence of fraud the debt may be identified by parol. *Wood v. Weimer*, 204.

4. The rule that the holder of commercial paper, seeking to enforce in equity a mortgage security therefor, is subject to any defence which would be good against the mortgage in the hands of the mortgagee, has no application to deeds of trust given to secure railroad coupon bonds. *Peoria and Springfield Railroad Co. v. Thompson*, 684.

5. Where a railroad, its appurtenances and franchises, are mortgaged as a whole, there is no power or authority to sell them separately, and such property, not being, strictly speaking, either real or personal estate, is sold on foreclosure proceedings without any right of redemption. *Id.*

6. The giving of further time for the payment of an existing debt, is a valuable consideration sufficient to support the mortgage as a purchase for value. *Cass County v. Oldham*, 684.

7. If taken as security until solvency of proposed surety is ascertained, it will be presumed to be discharged upon the acceptance of the surety. *Baile v. St. Joseph F. and M. Ins. Co.*, 37.

8. In a foreclosure suit the amount due, the day for payment and an order of sale upon default may be embraced in one decree. *Chicago, D. and V. Railroad Co. v. Fodick*, 421.

9. An error in such decree, in the finding of the amount due, will vitiate all subsequent proceedings. *Id.*

10. Where a railroad mortgage gave to trustees power to foreclose upon request of a majority of bondholders, they have no power to proceed without such request. *Id.*

11. A mortgagee who has paid a prior incumbrance, is entitled to repayment thereof when the mortgagor comes to redeem. *McCormick v. Knox*, 486.

12. Where an assignee of notes secured by mortgage fails to take and record an assignment of the mortgage, and the mortgagee subsequently acquires the equity of redemption, enters a release of the mortgage and gives a new mortgage, the latter mortgagee acquires a prior lien. *Ogle v. Turpin*, 486.

13. Where the trustee in a deed of trust releases without the consent of the party secured, a subsequent incumbrancer without notice cannot acquire a prior lien, but if the party secured has authorized the trustee's act, or failed to promptly repudiate it, he is estopped from denying its validity. *Barbour v. Scottish Am. Mortgage Co.*, 485.

14. In equity parol evidence is admissible to reform a mortgage. *Tabor v. Cilley*, 75.

15. But equity will not reform a mortgage given by one insolvent if the rights of third persons would be injuriously affected thereby. *Id.*

16. A mortgage lien purchased by the owner of the equity of redemption will be kept alive in equity for the protection of the purchaser whether the purchaser takes an assignment of the lien or a release of the mortgagee's interest. *Duffy v. McGuinness*, 814.

17. After the expiration of the statutory time to redeem property sold under foreclosure proceedings, the mortgagor cannot maintain a bill to redeem on the ground that the right of redemption was not secured to him by the decree. *Burley v. Flint*, 622.

II. Of Chattels.

18. Where a mortgage is made of chattels which both parties know belong

MORTGAGE.

to a third person, the mortgagor cannot afterwards, as against the mortgagee, deny his ownership. *Harvey v. Harvey*, 814.

19. A paper as follows: "Received of J. J. Findley and W. F. Findley, \$25 in full payment for one black cow, about six years old, and one calf, now belonging to said cow, about two months old, said cow being the cow I bought of Bob Reed. It is agreed by the purchasers of the above property and Austin Hughes, the signer of this receipt, that said Hughes shall retain the property and use the same from this date to the first day of October next, at which time, should the said Hughes pay to said Findleys \$25, then the property to remain said Hughes's, but if the money be not paid that day the property to be delivered up to the said Findleys." *Held*, to be a mortgage. *Findley v. Deal*, 814.

20. Purchase by mortgagee at his own sale under a chattel mortgage, will not be set aside when made with the consent of the mortgagor. *Goodell v. Dewey*, 75.

III. Of Realty.

21. A mortgage of lands not owned by the mortgagor, will become a lien thereon the moment the mortgagor acquires title to the land, and it cannot be rendered subordinate to the lien of subsequent judgments. *Rice v. Kelso*, 754.

22. Holders of judgment liens, not made parties in the foreclosure of a superior mortgage, have their right of redemption, but cannot acquire titles under execution sales that will defeat the mortgage title. *Id.*

23. If a mortgagee takes possession and permits the mortgagor to take the profits, he will be required to account, at the suit of other creditors, for the profits, but in the absence of fraud he will be required to account for only such as are actually received. *Ely v. Turpin*, 684.

24. In the ordinary case of a purchase of an equity of redemption from a mortgagor, with a provision in the deed that the grantee assumes and agrees to pay the mortgage debt, no right of action on the promise accrues to the mortgagee. *Meech v. Ensign*, 608.

25. Of an undivided moiety in land will not be transferred to a particular part allotted to the mortgagor in severalty by a subsequent partition to which the mortgagee was not a party. *Juckman v. Beck*, 349.

MUNICIPAL BOND. See **CONFLICT OF LAWS**, 2. **EQUITY**, 2. **LIMITATIONS**, **STATUTE OF**, 11.

1. Good in the hands of an innocent purchaser, although issued by a court *de facto* but not *de jure*. *Ralls Co. v. Douglass*, 814.

2. Where by statute authority is given to execute bonds under seal, the requirement of a seal is directory merely, and the omission of a seal does not invalidate the bonds. *Draper v. Town of Springport*, 273.

3. A statute authorized precincts of counties to vote for the issue of bonds in aid of internal improvement, and provided that upon such vote the county commissioners should issue special bonds for such precinct and levy a special tax upon the property within such precinct. *Held*, that suit upon such bonds should be brought against the county and not against the precinct. *Held further*, that it was no defence to an action upon such bonds in a federal court that the state statute had provided a remedy by mandamus. *Davenport v. County of Dodge*, 622.

4. Where municipal authorities have upon forged assignments cancelled certificates of stock belonging to a minor, and issued new certificates to the assignee, they may replace the certificates belonging to the minor and pay to his guardian the arrears of interest. *Council of Baltimore v. Ketchum*, 486.

MUNICIPAL CORPORATION. See **CONSTITUTIONAL LAW**, 7. **EQUITY**, 2. **MANDAMUS**, 3. **NEGLECT**, 9. **TAXATION**, 8, 9.

1. Is liable in damages for injury to abutting lot caused by a failure, in raising the grade of the street, to restrain the earth within the limits of the street. *Broadwell v. City of Kansas*, 539.

2. In a suit for such damage a record of a judgment against the lot holder upon tax bills for the work is not admissible. *Id.*

3. Liable for injury to lot caused by negligent excavation of street although the lot does not immediately abut upon the street. *Keating v. Cincinnati*, 622.

MUNICIPAL CORPORATION.

4. Such liability extends to injury to improvements on the lot, if the owner is not chargeable with negligence in making them. *Keating v. Cincinnati*, 622.
5. May do an authorized act by resolution as well as by ordinance. *State v. City of Passaic*, 684.
6. The judgment of commissioners of assessment on matters of fact will not be reversed except for clear error. *Id.*
7. Not liable for mere slipperiness of highway from snow or ice. *Smith v. Bangor*, 74.
8. Notice to municipal officers must be notice of the identical defect and not merely of a cause likely to produce it. *Id.*
9. Notice cannot be proved by the admission of a municipal officer, though his declarations accompanying his official acts are admissible. *Id.*
10. Not liable for injury to scholar through a defect in the heating apparatus of a school which is voluntarily maintained by the corporation under a general statute. *Wixon v. City of Newport*, 548.
11. A city officer taking earth from private property for use in improving the streets is liable in trespass, but the city is not. *Rowland v. City of Galatin*, 685.
12. Where a city builds a bridge upon a street, and thereby cuts off access to a house along an intersecting street, except by means of stairs, the city is liable to the owner of the house in damages. *Rigney v. Chicago*, 483.
13. A county is not liable upon a warrant drawn upon a fund which has become exhausted, and which the authorities have no power to replenish. *Moody v. Cass County*, 486.
14. A statutory authority to license certain trades, excludes the power to license trades not enumerated. *City of Cairo v. Bross*, 273.
15. The debts of a municipal corporation are not extinguished by the repeal of its charter, and upon its re-incorporation under a new name, pending suits may be revived against such new corporation. *O'Conner v. City of Memphis*, 181, and note.
16. A legislative provision exempting such new corporation from liability for such debts is unconstitutional. *Id.*
17. Whether the legislature may withhold the taxing power for such debts not decided. *Id.*
18. The courts will not take notice, *ex propria motu*, of municipal ordinances. *Laviosa v. Chicago, St. L. and N. O. Railroad Co.*, 549.
19. Where restrictions are placed by law on the erection of certain structures, there is an implied authority to erect them provided the restrictions be complied with. *Id.*
20. Without general legislation declaring all of its class a nuisance, a city cannot declare any particular thing to be one. *Id.*
21. A municipal ordinance authorizing an unreasonable or oppressive use of a street by a railroad is void. *Id.*

MURDER. See CRIMINAL LAW, VI.

NAME. See TRADEMARK, 5.

1. The term "junior," is no part of a man's name, and if a son who bears the same name as his father, buys land in his own name without the designation of "junior," there is no presumption that he intended the father should take title. *Simpson v. Dix*, 349.
2. In such case evidence is admissible to show who is the grantee. *Id.*

NATIONAL BANKS. See BANK. CORPORATION, 3, 4.

1. A national bank, in voluntary liquidation under sect. 5220 Rev. Stat., is not thereby dissolved as a corporation, but may sue and be sued, and it is no defence to a suit by a creditor that he has also filed a creditor's bill to enforce the individual liability of the stockholder. *Central Nat. Bank v. Conn. Mut. Life Ins. Co.*, 76.
2. The fact that by the law of the state in which a national bank is situated, the purchase of business paper from the payee at a greater rate of discount than the legal interest, is not usurious, will not relieve the bank from the

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penalty imposed by sect. 5198 Rev. Stat. *Nat. Bank of Gloversville v. Johnson*, 205.

3. Sect. 5228 U. S. Rev. Stat. does not make property belonging to others found in the custody of a national bank at the time of its suspension, under contracts other than special deposit, liable for the debts of the bank. *Louisiana Ice Co. v. State Nat. Bank*, 135.

NAVIGABLE STREAM. See **WATERS AND WATERCOURSES**, 1, 3, 7.**NEGLIGENCE.** See **AGENT**, 4. **BANK**, 1. **BILLS AND NOTES**, 9. **COMMON CARRIER**, 3, 4. **JUDGMENT**, 3. **MASTER AND SERVANT**, 4-10, 12, 13. **MUNICIPAL CORPORATION**, 1, 3, 7, 10. **RAILROAD**, 3-10. **STREET**, 1, 2. **TELEGRAPH**, 5-8.

1. Where an injury is caused by the successive negligent acts of two persons, and the first is compelled to pay damages, he cannot recover indemnity against the other. *Churchill v. Holt*, 273.

2. Owner of vessel liable for injury caused by negligence of master, to passengers who had chartered the vessel. *Cuddy v. Horn*, 302, and note.

3. Where a collision occurs through the fault of both vessels, a passenger injured may maintain a joint action against them. *Id.*

4. The mere fact of the explosion of a boiler raises a presumption of negligence against the owner whose servants are operating it, and the burden is on him to disprove such negligence. *Rose v. Stephens & Condit Trans. Co.*, 522.

5. General principles governing suits for damages caused by explosions. *Id.*, note.

6. In an action against a railroad company for an injury causing death, where it appears that the deceased was found on a siding under the cars at a place not a public crossing, the burden is on plaintiffs to prove negligence on the part of the railroad employees. *State v. Balt. & Ohio Railroad Co.*, 754.

7. The fact that the cars had no brakeman on them while being run on the siding, is not sufficient to charge the defendant with negligence. *Id.*

8. In an action against a railroad for killing live stock, negligence on the part of the company must be shown, it is not inferred from the mere fact of the killing. *P. C. & St. L. Railway Co. v. McMillan*, 422.

9. In an action against a city for injury by an obstruction of a stream, the failure of the plaintiff to use ordinary diligence and incur moderate expense, if by so doing he could have prevented the injury, is contributory negligence. *Hoehl v. City of Muscatine*, 754.

10. The doctrine of riparian proprietorship does not apply to a stream meandering through a city. *Id.*

11. Owners of a wharf are liable to a customs officer who visits it in the performance of his duties, for injuries received because of its unsafe condition. *Low v. Grand Trunk Railway Co.*, 76.

12. When it is the duty of such officer to watch for smugglers, the fact that he does not carry a light in passing over the wharf at night is not contributory negligence. *Id.*

13. The fact that a person noticed, on entering a building, that there was ice on a sidewalk in front of the door, is not conclusive evidence in an action against the owner for an injury sustained on his way out, that he was not in the exercise of due care in attempting to pass over the sidewalk. *Devire v. Bailey*, 349.

NEGOTIABLE INSTRUMENT. See **BILL OF LADING**. **BILLS AND NOTES**.

1. In the case of a *bona fide* purchase of stolen coupons after maturity, there is no presumption that they had been negotiated before maturity, and the owner, upon proof of the theft, may recover from the purchaser. *Hinckley v. Merchants' Nat. Bank*, 349.

2. Certificate of stock with blank power of attorney is not a negotiable instrument. *Note to Cherry v. Frost*, 57.

3. Where one, for a present consideration, in good faith purchases bonds in the regular course of business from a railroad company, such bonds will be regarded as having been issued for money, labor or property "actually received

NEGOTIABLE INSTRUMENT.

and applied," within the meaning of a constitutional provision prohibiting the issue except for such considerations. *Peoria and Springfield Railroad Co. v. Thompson*, 685.

NEW TRIAL. See **CRIMINAL LAW**, 15, 16. **JURY**, 2. **VERDICT**, 1.

1. Where the evidence is undisputed the court may direct the jury to enter a general or special verdict or may itself find the fact and render judgment, and it is intimated herein that after setting aside a special verdict as contrary to the evidence, the court might either grant a new trial, direct the proper verdict or render judgment according to the evidence. *Gammon v. Abrams*, 141.

2. A party who, after a special verdict has been set aside, does not ask for a new trial, waives it. *Id.*

3. A "reaper and self-binder," was delivered to a conditional purchaser in July, and used in the harvest of that season, and found defective. In January or February following, the vendor's agent called on the purchaser in relation to payment for the machine, and the purchaser said he would give nothing for it; but he still kept it and did not offer to return it until the following April. *Held*, that there was no error in setting aside a finding by the jury that the machine was returned in a reasonable time, and rendering judgment for its value. *Id.*

NOTICE. See **AGENT**, 8. **LIS PENDENS.** **POSSESSION**, 1.

1. The record of a deed which is void for insufficiency of description, is not constructive notice. *Cass Co. v. Oldham*, 685.

2. Two executors sold realty; a third party bought; on the same day he conveyed the land to one of the executors; some two years thereafter the latter sold to a purchaser for value; the deeds all purported to be for a fair and valuable consideration. *Held*, that the facts appearing from the deeds, were not sufficient to put the purchaser on notice that the sale was by an executor to himself. *Cox v. Barber*, 350.

NUISANCE. See **MUNICIPAL CORPORATION**, 20. **SHERIFF**, 5. **STREET**, 1. **WATERS AND WATERCOURSES**, 7.

1. When an erection in the highway is not a nuisance *per se*, the question as to whether it is a nuisance is one of fact for the jury. *City of Allegheny v. Zimmerman*, 622.

2. The erection of a liberty pole in a street, being sanctioned by uniform custom, is not a nuisance *per se*. *Id.*

OFFICER. See **ACKNOWLEDGMENT**, 1. **CONTRACT**, 7. **CORPORATION**, 11, 15. **EXECUTION**, 8. **MUNICIPAL CORPORATION**, 8, 11. **TRESPASS**, 1.

An official bond for the discharge of the duties of an office according to law embraces duties added by subsequent statutes. *Dawson v. The State*, 421.

ORDINANCE. See **ERRORS AND APPEALS**, 12. **MUNICIPAL CORPORATION**, 22.**PARENT AND CHILD.** See **CONFLICT OF LAWS**, 3. **DEED**, 2. **DURESS**, 3. **EQUITY**, 12. **HUSBAND AND WIFE**, 25. **INSURANCE**, 10. **RAILROAD**, 3. 4. **WILL**, 4. 5.

1. If a minor hire himself out to service, his father may claim the wages under the contract or the value of his son's time, less whatever time was allowed him by the employer. *Sherlock v. Kimmell*, 685.

2. If a father hire his minor son for an indefinite period, the employer may discharge the son at any time without notice. *Id.*

3. In an action by the father to recover the son's wages, statements made by the son are not admissible in evidence against the father. *Id.*

4. In deciding as to the custody of infants, the chancellor must act as humanity, respect for parental affection and regard for the infant's best interests may prompt. *Verser v. Ford*, 350.

5. As against strangers the father, if of good moral character and able to support the child, is entitled to its custody; and, as between father and mother or other near relation, the father is generally to be preferred. *Id.*

6. The words "child or children" in the by-laws of a benevolent association providing for the payment of benefits do not include grandchildren. *Winsor v. Odd Fellows Beneficial Association*, 205.

PARTIES. See **ARREST**, 1.

PARTITION. See **MORTGAGE**, 25.

PARTNERSHIP. See **ATTORNEY**, 8. **DEBTOR AND CREDITOR**, 12. **FRAUDS, STATUTE OF**, 3. **TRADEMARK**, 5.

1. The funds of an insolvent firm paid by one partner upon his private debt without the consent of his copartner, may be attached at the suit of a firm creditor, even though the copartner was surety for the payment of such debt, and the money was collected upon a draft in the firm name. *Johnson v. Hersey*, 486.

2. The interest of a copartner in the partnership property may, in Rhode Island, be attached and sold at the suit of his individual creditor, and the purchaser at such sale is entitled to delivery of the property and becomes tenant in common with the other partners, subject to the partnership equities. *Randall v. Johnson*, 142.

3. A general assignment of all the assignor's estate, except what is exempt from attachment, conveys his interest as partner in the property of his copartnership. *Stiness v. Pierce*, 549.

4. The seizure and removal of firm property on an execution against one partner for his private debt constitutes a trespass for which the officer is liable in an action. *Sanborn v. Royce*, 799, and note.

5. A partner is liable individually as a stockholder to creditors of a corporation in which the partnership own stock. *Bray's Adm'r v. Seligman's Adm'r*, 686.

6. A member of a voluntary association is not liable for a debt incurred by a committee, if it does not appear that he was present at the appointment of the committee, and there is no evidence of the latter's authority. *Volger v. Ray*, 543.

7. When it is proved that the name of one sued as a partner, appeared as such in an advertisement in a paper to which he subscribed, and also on the letter heads of the firm, evidence of the general understanding and report of the community where the partnership business was carried on, is also admissible. *Rizer v. James*, 142.

8. Where one is held out as a member of a firm with his own assent, he is responsible to every creditor or customer of the firm for all its liabilities. *Id.*

9. A retiring partner who fails to give notice of his retirement, continues to be liable to persons dealing with the firm, and it is immaterial whether such failure was negligent or unavoidable. *Uhl v. Harvey*, 118, and note.

10. It is the duty of such partner to give notice to the public as well as to those who have dealt with the firm. *Id.*

11. The questions of good faith in the retirement and of actual notice to the plaintiff, are for the jury. *Id.*

12. All the partners are liable for the wrongful seizure of a stranger's goods under an attachment issued by the authority of one partner alone, for the recovery of a partnership debt. *Kuhn v. Weil*, 77.

13. Real estate purchased with partnership funds for partnership purposes, although the title be taken in the name of one partner, is treated in equity as personal property if necessary for the settlement of the partnership, and in case of death a sale of such real estate by the surviving partner will be enforced by compelling a conveyance of the legal title. *Shanks v. Klein*, 77.

14. An appropriation of partnership funds by one partner to the payment of a debt which the creditor knew was the private debt of the partner, is presumptively fraudulent, but such presumption may be rebutted by proof of authority, consent or ratification by the other parties. *Johnson v. Crichton*, 350.

15. Whether such authority or consent was given is a question for the jury. *Id.*

16. A mortgage to a firm without naming the individual partners is valid, and may be foreclosed. *Chicago Lumber Co. v. Ashworth*, 142.

17. One partner cannot, without the consent of the others, sell the partnership business, and if he attempts to do so a constructive trust attaches to the property in the hands of the purchaser. *Drake v. Thyng*, 422.

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PARTNERSHIP.

18. After dissolution, one partner cannot bind the others by note in firm name. *Waller v. Davis*, 707, and note.

19. A dissolution is not *ipso facto* worked by assignment of the interest of one partner to the others, but such assignment is evidence of dissolution if known to the payee of the note. *Id.*

20. Where one partner withdraws from a firm, a note subsequently given in the firm name by one of the remaining partners for a debt of the old firm, is not binding on his copartners unless the new firm assumed the liabilities of the old firm. *Id.*

21. Where one partner makes his individual note to his own order, and endorses it with his own name and then the name of the firm, and sells it through a broker, appropriating the proceeds to his own use, the firm is liable thereon to a *bona fide* purchaser from the broker. *Redlon v. Churchill*, 487.

22. Where one partner, without the consent of his copartner, brings suit in the firm name, but the copartners take no steps to have it dismissed until a decree entered in favor of the firm is reversed on appeal, they cannot claim relief against the execution of the final decree. *Harris v. Mosby*, 755.

23. It makes no difference in such case that the acquiescence of the partners was in consequence of ignorance of the law. *Id.*

24. A partner of a firm formed for an indefinite time may withdraw at any time. *Fletcher v. Reed*, 249.

25. Declarations of one partner not made in the presence of the other partners nor subsequently assented to by them, are inadmissible as against them to establish the partnership. *Flournoy v. Williams*, 486.

PART OWNER. See SHIPPING, 1.

PATENT. See FRAUD, 1. UNITED STATES, 1.

1. May be subjected by bill in equity to a judgment debt of the patentee. *Ager v. Murray*, 469.

2. Upon such a bill the court may compel the patentee to assign or may appoint a trustee for that purpose. *Id.*

3. The question of the identity of the inventions described in the original patent and the re-issue is one for the court and not for the jury, unless it appears from the face of the instruments that extrinsic evidence is needed to explain terms of art or to apply the descriptions to the subject-matter. *Heald v. Rice*, 487.

4. A patent for a machine cannot be re-issued for the purpose of claiming the process of operating that class of machines. *Id.*

5. A claim can only be enlarged by a re-issue when an actual *bona fide* mistake has been inadvertently committed, and when it appears from a comparison of the patent and the re-issue that there has been laches in discovering the mistake and applying for the re-issue, the court may declare such re-issue invalid. *Miller v. Bridgeport Brass Co.*, 274.

6. A re-issue cannot be had for the purpose of expanding the claim to embrace an invention not specified in the original. *James v. Campbell*, 274.

7. A patentee cannot claim in a patent the same thing claimed by him in a prior patent, nor what he omitted to claim in a prior patent in which the invention was described, he not having reserved the right to claim it in a separate patent and not having seasonably applied therefor. *Id.*

8. A patent for a machine cannot be re-issued for the purpose of claiming the process of operating that class of machines. *Id.*

9. The government of the United States has no right to use a patented invention without compensation to the owner of the patent. *Id.*

10. *Quere*, whether an officer of the government can be sued for using an invention only for and in behalf of the government, and whether the Court of Claims is not the only tribunal in which such claim can be prosecuted. *Id.*

11. A bill for an account of profits merely, cannot be sustained. There must be some other equity to which such relief is incidental. *Root v. Lake Shore & M. S. Railroad Co.*, 550.

12. A specification is sufficiently clear when intelligible to a person skilled in the art. *Webster Loom Co. v. Higgins*, 686.

PATENT.

13. Evidence is admissible to show the meaning of terms used in a patent. *Webster Loom Co. v. Higgins*, 686..
14. If an improvement of a well-known appendage to a machine is fully described in a specification, it is not necessary to show the ordinary modes of attaching the appendage to the machine. *Id.*
15. *Quere*, whether the defence of insufficient description can be set up without alleging an intent to deceive the public. *Id.*
16. A new combination of well-known devices producing a new and useful result, may be the subject of a patent. *Id.*
17. Of two original inventors, the first will be entitled to a patent unless the other puts the invention into public use more than two years before the application for a patent. *Id.*
18. An invention relating to machinery may be exhibited as well in a drawing as in a model, so as to lay the foundation of a claim to priority. *Id.*
19. If the omission to set out in the answers the defence of prior invention, is not objected to at the proper time in the court below, it cannot be objected to in the Appellate Court. *Id.*
20. Where a patented improvement is required to adapt a machine to a particular use, and there is no other way of supplying the demand for that use, the damages for infringement should be the entire profits made by the infringer in that market. *Goulds Man. Co. v. Cowing*, 623.
21. In such case it is error to restrict the damages to such profits as were realized from the manufacture of the patented improvement as distinguished from the profits realized from the whole machine as improved. *Id.*
22. The claim in letters patent cannot be enlarged by the language used in other parts of the specification. *Lehigh Valley Railroad Co. v. Mellon*, 77.
23. To constitute a public use of an invention it is not necessary that more than one of the invented articles should be used, or that such use should be by more than one person. And if the inventor permits such use without restriction, it is a public use, notwithstanding that by the very character of the invention it is only capable of being used where it cannot be seen by the public eye. *Egbert v. Lippman*, 205.

PAYMENT. See **BILLS AND NOTES**, 12, 13.

1. The acceptance of the promissory note of a debtor for a pre-existing debt secured by mortgage is only presumptive evidence of payment, and the question is one of fact for the jury. *Dodge v. Emerson*, 550.
2. In such a case it is not error for the judge to remark in his charge that in the event of insolvency the old note and mortgage might be more valuable than the new note. *Id.*
3. Payment of taxes under protest to an officer who has a warrant for their collection and threatens to collect by levy and sale, is not a voluntary payment. *Ruggles v. City of Fond du Lac*, 143.
4. Where one buying milk pays for each can on the supposition that it contains eight gallons, when in fact it contains less, he may set off the money paid for the shortage out of any sum he may owe the seller. *Devine v. Edwards*, 205.

PENSION.

Taking from a pensioner more than the statutory price for obtaining a pension is *per se* unlawful, although there be no wrongful intention, and such excess may be recovered of the taker in an action by the pensioner. *Swart v. White*, 487.

PLEADING. See **ARBITRATION**, 2. **CRIMINAL LAW**, 19. **EQUITY**, 10, 18, 19. **FRAUDS**, **STATUTE OF**, 6. **INSURANCE**, 12. **LIBEL**, 2. **MANDAMUS**, 2. **USURY**, 1.

1. In an action for trespass to land, a license must be specially pleaded. *Lockhart v. Geir*, 423.
2. Where goods sold are to be paid for in other goods or labor an action to recover the same must be by special count. *Slayton v. McDonald*, 422.
3. The complaint should not anticipate and reply to matters of defence. *Uhl v. Harvey*, 118.

PLEDGE. See **CRIMINAL LAW**, 24. **CUSTOM**, 1. **EXECUTION**, 6.

1. If a pledgee of a certificate of stock, with a blank power of attorney, wrongfully assigns it as security for money loaned him, the sub-pledgee who receives the stock in ignorance of the owner's equity, is entitled to hold the stock as against the owner, to the extent of the consideration. *Cherry v. Frost*, 57, and note.

2. An assignment of such stock as collateral, to replace other collaterals surrendered, is an assignment for value. *Id.*

3. The assignee is not entitled to the benefit of subsequent payments upon the stock made by the owner. *Id.*

4. A pledgee of stock may transfer the shares to his own name. *Hubbell v. Drexel*, 452, and note.

5. Such pledgee is not bound to retain the identical shares if others of the same kind are kept on hand. *Id.*

6. A receipted bill of chattels purporting to be security for a debt, is a pledge and not a mortgage; and if the pledgee permits the pledgor to resume possession and to hold them until his death, he cannot, by then taking possession of them, defeat the right of the administrator to maintain against him an action for their conversion. *Thompson v. Dolliver*, 815.

POSSESSION. See **LANDLORD AND TENANT**, 4.

1. Possession under an unrecorded deed or mortgage, is notice to the same extent as if the instrument was recorded. *Brainard v. Hudson*, 686.

2. The record of a judgment in a summary process for the recovery of leased premises by A. against B., is conclusive evidence against B. and his grantees that he was in possession at the time as tenant of A., and that his possession extended to the boundary line of the demised premises. *Richmond v. Stahle*, 274.

PRACTICE. See **ADMIRALTY**, 10. **BILL OF EXCEPTIONS**, 1, 2. **BILLS AND NOTES**, 10. **CRIMINAL LAW**, 14. **EQUITY**, 4, 13. **TRIAL**, 1, 2, 4.

1. In a joint action against two defendants for a tort, there may be a verdict and judgment against one alone. *Boswell v. Gates*, 422.

2. Any judicial determination arrived at without notice and opportunity to parties to be heard, is void. *Wood v. Howard*, 550.

3. A decree based on unsworn statements will be set aside. *Id.*

PRESCRIPTION. See **EASEMENT**, 1.**PRESUMPTION.** See **CRIMINAL LAW**, 7, 28-30. **EXECUTORS**, 1. **NEGLIGENCE**, 4, 8. **PARTNERSHIP**, 14.**PUBLIC POLICY.** See **CONTRACT**, 11. **INFANT**, 2. **INSURANCE**, 11, 15. **SHERIFF'S SALE**, 1. **TELEGRAPH**, 10.

An agreement by a lumber dealer to pay to a builder a commission on sales made to the builder's employers, is void as against public policy. *Atlee v. Fink*, 678.

RAILROAD. See **COMMON CARRIER**. **CONSTITUTIONAL LAW**, 23, 24. **CONTRACT**, 14. **CORPORATION**, 8, 10. **DAMAGES**, 5, 6. **EXPRESS COMPANY**. **MASTER AND SERVANT**, 8-11. **MORTGAGE**, 4, 5, 8-10. **NEGLIGENCE**, 6-8. **RECEIVER**, 1-3, 7. **SPECIFIC PERFORMANCE**, 1.

1. Where by a stipulation on a passenger ticket, it is to be used on or before a certain day, the ticket is good if presented within the time, although the journey is not completed until after the time. *Auerbach v. N. Y. Cent. Railroad Co.*, 790, and note.

2. Where a ticket binds the passenger to a continuous journey, he is not bound to commence it at the starting point named in the ticket. *Id.*

3. Has exclusive right to track, and owes no duty to parents of young children trespassing thereon. *Cauley v. Pittsburgh, Cincinnati and St. Louis Railway Co.*, 622.

4. Parents who permit their children to trespass on the track are guilty of contributory negligence, even though the trespass was without their knowledge. *Id.*

5. A railroad company, over whose road another company has by contract a right to run trains, is liable for injury caused by the negligence of its switch-

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man to the employees and property of the other company. *In re Central Vermont Railroad Co.*, 687.

6. Is bound to provide for a careful lookout in the direction in which a train is moving in places where people are likely to be upon the track. *Townley v. C. M. and St. P. Railroad Co.*, 205.

7. Although a statute makes it unlawful to walk along a railroad track, it is error to reject evidence that many persons had for years been in the habit of passing daily and hourly in the same pathway on which the injured person was passing. *Id.*

8. The omission to ring a bell or sound a whistle as a train approaches a crossing may be given in evidence, in an action for an injury at the crossing, without being specially pleaded. *Goodwin v. Chicago, R. I. and P. Railroad Co.*, 685.

9. It is not negligence *per se* to run a train at the rate of twenty-five miles an hour across a public road. *Id.*

10. The fact that a train could not be stopped within the distance that the headlight would show obstructions on the track, is not the true test of negligence. *Milam v. L. & N. Railroad Co.*, 755.

11. Grants to be satisfied out of sections along the line of a road give no license to the grantees to roam over the whole public domain lying along the road, but must be satisfied out of the nearest undisposed of sections which meet the conditions named. *Wood v. Burlington & Mo. River Railroad Co.*, 206.

RATIFICATION. See **ATTORNEY**, 5. **PARTNERSHIP**, 14.

RECEIVER. See **CONFLICT OF LAWS**, 1. **LANDLORD AND TENANT**, 5.

1. Receiver of railroad cannot, without leave of the court, be sued for injury caused by the negligence of his employees. *Barton v. Barbour*, 274.

2. Where questions of fact are involved the court may either allow the injured party to sue the receiver in a court of law or direct a feigned issue. *Id.*

3. A court of equity may authorize a receiver to keep a road in repair and operate it in the ordinary way. *Id.*

4. The court of another state has no jurisdiction without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the state in which he was appointed. *Id.*

5. In a suit by a receiver on a note taken by his predecessor in office it is no defence to show that the note was given as security for an unauthorized loan of the trust funds by such predecessor. *Corbin v. De La Vergne*, 687.

6. The rule that a receiver must apply to the court before expending large sums of money will not be so rigidly enforced as to work injustice where the receiver has acted in good faith, and under such circumstances that previous authority would have been granted on application. *Brown v. Hazlehurst*, 77.

7. If the holder of railroad bonds desires to question the right of the receiver to issue, under an order of court, certificates of indebtedness as a first lien on the property, he must do so before such certificates have been issued and sold to *bona fide* purchasers. *Humphreys v. Allen*, 275.

8. The courts of Rhode Island cannot appoint a receiver of a foreign corporation doing business in that state. *Stafford v. Am. Mills Co.*, 206.

9. **RECEIVERS FOR CO-TENANTS**, 761.

RECORDS.

The books used by a recorder of mortgages and the researches or memoranda of mortgages made by his clerks are dedicated to the public service and are not his private property. *Herron v. McEnery*, 206.

RECEUPMENT. See **SET-OFF**.

RELEASE. See **CONTRACT**, 12.

REMOVAL OF CAUSES. See **EQUITY**, 7.

1. A corporation of one state operating a railroad in another state under a lease, does not become a citizen of the latter state, and if sued therein may remove the case to the federal courts. *Balt. & Ohio Railroad Co. v. Kowitz*, 143.

REMOVAL OF CAUSES.

2. Where in a federal court the evidence shows that there had been a collusive transfer to give jurisdiction, it is the duty of the court, on its own motion, to dismiss the suit. *Williams v. Township of Nottawa*, 207.

3. To entitle a party to a removal under the second clause of the second section of the Act of March 3d 1875, there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different states from those of the other. *Hyde v. Ruble*, 487.

4. The second clause of sect. 639 Rev. Stat. was repealed by the Act of 1875. *Id.*

REPLEVIN. See EVIDENCE, 5. SHIPPING, 1.

RESCISSION. See CONTRACT, 6, 10. INFANT, 1. SHERIFF'S SALE, 4.

RIPARIAN RIGHTS. See NEGLIGENCE, 9, 10. WATERS AND WATER-COURSES, 1-3, 5.

SALE. See ASSUMPSIT. BILLS AND NOTES, 6. CONTRACT, 8. DEBTOR AND CREDITOR, 1-5, 21. FRAUD, 1-3. NEW TRIAL, 3. TROVER, 1-4. UNITED STATES COURTS, 6. VENDOR AND VENDEE.

1. A lease by which the lessee, upon full payment of rent, is to receive a bill of sale, is a conditional sale, and the vendee has an interest which he can mortgage. *Carpenter v. Scott*, 550.

2. Such mortgage is valid as against a creditor who attached immediately upon the completion of the last payment. *Id.*

3. An agreement that, "The subscriber has, this 21st day of December 1877, rented of H. (the plaintiff) one choral organ, during the payment of rent as herein agreed, for the full rent of \$190, payable as follows: one melodeon valued at \$50, as first payment, and one note for \$140, due January 15th 1879; with the understanding that if I shall have punctually paid all said rent I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due, all my rights herein shall terminate, and said H. may take possession of said organ," is not a lease but a conditional sale, and the vendor cannot recover upon the \$140-note after the organ had been returned. *Hine v. Roberts*, 206.

4. A buyer of an interest in a business who has ample opportunity to examine the goods and the books, has no right to rely upon representations of the seller as to value and amount of business. *Poland v. Brownell*, 350.

5. Where the breakage in transportation is not greater than the usual breakage in goods of that character, the vendee cannot refuse to receive them. *Hays v. Smith*, 143.

6. A written contract of sale which does not show that it was made by sample cannot be modified by proof that it was so made. *Wiener v. Whipple*, 143.

7. Where a known, described and defined thing is sold, there is no implied warranty that it shall answer the purpose for which it is bought, even though the vendor be the manufacturer and the purpose is stated by the vendee. *Rasin v. Conley*, 756.

8. Where the vendee declares that he confides in the judgment of the vendor, the latter, if he accepts the trust, is liable for unfair representations, even as to things easily discernible on examination, but he is not liable for mistake of judgment. *Hanger v. Evans*, 755.

9. If the vendor knowing the vendee to be inexperienced deceitfully induces the latter not to inquire into the condition of the article, he is guilty of fraud. *Id.*

10. If a vendor knowingly makes a false representation as to the fitness of the article for the purchaser's business, he is liable to the vendee. *Id.*

11. When the vendor of property sold on trial agrees to examine the working of the article and learn the result himself, the vendee need not notify him of its failure. *Gibson v. Vail*, 77.

12. It is a species of fraud to sell an article on trial, when the vendor knows or ought to have known that the trial must result in failure. *Id.*

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13. Conversations of the parties after the written contract is made, about the setting up and manner of using milk pans sold on trial, are admissible. *Gibson v. Vail*, 78.

SAVINGS BANK. See **GIFT**, 2. **TAXATION**, 10.

SCHOOL. See **MUNICIPAL CORPORATION**, 10.

SEAL. See **CONTRACT**, 12. **LIMITATIONS**, **STATUTE OF**, 2. **MUNICIPAL BONDS**, 2.

SET-OFF. See **EXECUTORS**, 13. **PAYMENT**, 4. **USURY**, 1. **VENDOR AND VENDEE**, 6.

1. A motion that one judgment be set off against another is an appeal to the equitable powers of the court, and in granting it the claim of the attorneys for fees will be respected. *Diehl v. Triester*, 275.

2. A *bona fide* purchaser in market overt of stolen cattle cannot, in an action by the owner after conviction of the thief, set off a claim for the keep of the cattle. *Walker v. Matthews*, 574, and note.

SHERIFF. See **CONTEMPT**, 1. **SHERIFF'S SALE**.

1. Sheriffs under writs directing in general terms the seizure of a debtor's property must at their peril determine the ownership of the property seized, but under writs commanding the seizure of specific property they incur no responsibility, and are bound only to look to the jurisdiction of the court and to the proper execution of its mandates. *Clavie v. Waggaman*, 207.

2. The sheriff of one county cannot make an arrest in another county except on fresh pursuit in case of an escape, nor can he detain in such other county an arrested prisoner except under a writ of *habeas corpus*. *Page v. Staples*, 207.

3. A sheriff is not obliged to travel about with an arrested prisoner to enable the latter to procure bail. *Id.*

4. A person appointed in writing by the sheriff to act as deputy possesses authority such as the sheriff himself may exercise. *Turner v. Holtzman*, 78.

5. The sheriff or his deputy may abate a public nuisance in a public highway, and in so doing may call other persons to his assistance. *Id.*

SHERIFF'S SALE. See **EXECUTION**, 5. **INJUNCTION**, 3, 4.

1. A contract between the defendant on an execution and a proposed purchaser of his property whereby the defendant agrees not to have the property run up, and the purchaser agrees to pay him the difference between the price brought and one thousand dollars, is founded on sufficient consideration and is not illegal. *Matthews v. Starr*, 481.

2. A renunciation by an insolvent debtor in favor of a particular creditor, dispensing with the forms of law, and by which the value of his property sold under execution is diminished, is contrary to good morals, and a sheriff knowing of the insolvency and dispensing with such forms in the sale is liable in damages to other creditors. *Tupery v. Harper*, 143.

3. The price brought by the property so sold will not be taken as a standard of its value. *Id.*

4. A creditor participating in the proceeds of a sheriff's sale is estopped from attacking it, unless the participation was made in error of fact, in which case the creditor upon return of what he has received may, in a suit to which all who participated in the proceeds are parties, have his participation rescinded. *Adams v. Moulton*, 551.

5. Purchaser is liable only to the sheriff for breach of his contract of purchase. *People v. Stelle*, 687.

SHIPPING. See **ADMIRALTY**. **BILL OF LADING**. **EQUITY**, 3. **NEGLECT**, 2.

1. A part owner of a vessel cannot maintain replevin for his undivided part, although he owns a major interest in the vessel. *Hackett v. Potter*, 275.

2. A seaman discharged in a foreign port who is prevented by the conduct of the master from making application to the consul, may recover in an action at law against the master his proportion of the extra pay which sects. 4582 and

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4584 U. S. Rev. Stat. require the master to pay to the consul. *Wilson v. Borstell*, 488.

3. The provision of sect. 4513, Revised Statutes, that the fee of \$2 required to be paid to the shipping commissioner for each seaman shipped, under sects. 4511 and 4512, shall not be exacted, where, on the return of the vessel, the sailor reships in the same vessel for another voyage, applies to reshipments for all voyages succeeding the first in regular order, and is not limited to the reshipment for the one voyage immediately following the one at which the fees were paid. *Young v. American Steamship Co.*, 551.

SLANDER. See **HUSBAND AND WIFE**, 26.

In an action of slander a refusal to charge that if plaintiff's general character was bad, that fact must be considered in estimating the damages, is error. *Campbell v. Campbell*, 623.

SPECIFIC PERFORMANCE. See **INSURANCE**, 18.

1. Will be decreed of a contract by a railroad company to issue bonds where the proceeding is an amicable one to test the power of the company to make such issue. *Phila. and Reading Railroad v. Stichter*, 713.

2. May be decreed of part of lands with compensation for the residue, but equity will not assume jurisdiction merely to award compensation where the vendee knows that the vendor cannot convey. *Bonner v. Little*, 756.

3. Where specific performance is decreed of part, the price should be abated in the proportion that the value of the tract is diminished by the deficiency. *Id.*

4. Where the terms of a contract rest wholly or partially in parol, and specific performance is sought on the ground of part performance, the terms must appear clearly and unequivocally; but the fact that the details of the agreement are controverted by the parties will not deter the court from ascertaining and giving effect to its terms. *Wharton v. Stoutenburgh*, 623.

5. Delivery of possession by a vendor or lessor accepted by the vendee or lessee is such an act of part performance as will take the contract out of the Statute of Frauds, and justify a decree for specific performance. *Id.*

6. Courts of equity will not decree specific performance of a contract of such a nature that to carry the decree into effect would require their continued personal supervision, but a contract for a lease of mines to be worked in a specified manner, is not within this principle. The court can grant relief by a decree that the lease be executed, leaving complainant to his legal remedy for breaches of the covenants contained in it. *Id.*

STATUTE. See **CONFLICT OF LAWS**, 4. **CONSTITUTIONAL LAW**, I. **EXECUTION**, 7, 8. **TRIAL**, 3. **UNITED STATES COURTS**, 2, 3.

1. Will be construed in the sense in which it has been long enforced by the departments of government. *State v. Kelkey*, 687.

2. Where excessive freight is collected during the existence of a statute making it unlawful, the repeal of the statute will not prevent the recovery of damages for such unlawful act. *Graham v. C. M. & St. P. Railroad Co.*, 207.

STOCK. See **CONTRACT**, 4. **CUSTOM**, 1. **GIFT**, 1. **LIFE TENANT**. **PLEDGE**, 1-5.**STOCK EXCHANGE.**

Nature of right to seat in. *Note to Smith v. Barclay*, 408.

STOPPAGE IN TRANSITU.

The right of stoppage in transitu is not defeated by an attachment of the goods after the termination of the transit, but while they still remain in the carrier's hands. *Mississippi Mills v. Union & Planters' Bank*, 534, and note.

STREET. See **ACTION**, 2. **CONSTITUTIONAL LAW**, 23. **MUNICIPAL CORPORATION**, 1, 3, 7, 11, 12, 22. **NUISANCE**, 2.

1. An obstruction of the sidewalk by cotton bales in front of a warehouse, if continued longer than is reasonably necessary for their transit into the ware-

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house, is a nuisance, and if a passer-by be injured thereby, the warehouseman is liable. *Muddox v. Cunningham*, 488.

2. Even if such obstruction be continued only for a reasonable time, yet if the bales be placed on the sidewalk so negligently as to cause injury to a passer-by, the warehouseman is responsible. *Id.*

SUBROGATION. See EXECUTORS, 10. NEGLIGENCE, 1. VENDOR AND VENDEE, 8.

1. If an heir to whom lands descend sells the same at private sale without administration on the ancestor's estate, to a *bona fide* purchaser, who applies the purchase-money to discharge liens and preferred claims, such purchaser will be subrogated to the rights of the holders of such claims. *Sidener v. Hawes*, 275.

2. Mortgagee paying taxes may be subrogated by decree, to the rights of the state as to lien, &c. *Sharp v. Thompson*, 75.

3. An agreement for subrogation on payment of first mortgage by third person at request of mortgagor, may be enforced against second mortgagee. *Shreve v. Hankinson*, 75.

SUNDAY. See CRIMINAL LAW, 4.

SURETY. See BILLS AND NOTES, 21. GUARDIAN AND WARD, 1, 2. LIMITATIONS, STATUTE OF, 4.

1. A surety on a note is discharged by the addition of other sureties without his knowledge. *Berryman v. Munker*, 423.

2. After damages assessed on his bond the surety for an assignee for creditors cannot object to a creditor's claim included therein which has been allowed and included in the assignee's accounts. *In re Estate of Stelle*, 144.

3. The right of sureties to be relieved from responsibility for the future acts or defaults of administrators or guardians is absolute and must be granted, but where the sureties do not appear on the day set by the court for the hearing their application may be dismissed. *Allen v. Sanders*, 114.

4. The omission of a company to collect monthly balances due from an agent does not discharge the sureties on a bond given by the agent to the company for faithful performance of his duties. *Watertown Fire Ins. Co. v. Simmons*, 276.

5. An endorsement on a note of an agreement to reduce the rate of interest is not an alteration of the note and does not discharge a surety of the maker. *Cambridge Sav. Bank v. Hyde*, 276.

6. A surety on an administrator's bond cannot avoid liability by showing that he signed upon an understanding with the administrator made known to the probate court that another person was also to sign, and that the other person never signed. *Wolff v. Schaeffer*, 488.

7. If an administrator who has converted assets by pledging them for his own purposes, fails to recover them when he might, his conduct constitutes a continuing breach, and if he has given an additional bond after the original conversion, but while he might yet recover the assets, the sureties in both bonds will be liable. *Id.*

8. The surety on an administrator's bond cannot attack collaterally a final settlement from which there has been no appeal. *Id.*

9. Where two persons gave their joint note for money loaned on an agreement known to the lender that each was to have one-half, it is not a case of suretyship, and a verbal agreement by the lender on payment of one-half by one maker to look to the other for the balance, is not binding. *Small v. Older*, 756.

10. Where the proceeds of mortgages executed to secure an individual note and a joint note were not sufficient to pay both, the holder of the notes was under no obligation to apply the sum realized upon both notes *pro rata*, but might apply the entire sum upon the individual note. *Id.*

11. The giving of a bond as collateral to a subsisting bond and mortgage does not, *per se*, suspend the right to proceed upon the latter, and a surety of the mortgagor is not discharged thereby. *Fleeman's Ins. Co. v. Wilkinson*, 621.

TAX AND TAXATION. See CONSTITUTIONAL LAW, 7, 15. DEED, 5. DOMICILE. ERRORS AND APPEALS, 1. EXPRESS COMPANY. MANDAMUS, 3. VOL. XXX.—109

TAX AND TAXATION.

MUNICIPAL CORPORATION, 6, 17. PAYMENT, 3. SUBROGATION, 2. TRESPASS, 1.

1. It is entirely within the province of the legislature to determine the rules of assessment of property and for the collection of taxes. *State v. Board of Assessors*, 207.

2. The owner of real estate is not personally liable for taxes assessed against another as owner. *City of Jefferson v. Mock*, 351.

3. An exemption of registered public debt from taxation by the laws of the debtor state cannot affect the right of another state to tax such debt in the hands of its own residents. *Bonaparte v. Appeal Tax Court of Baltimore*, 290, and note.

4. The recovery by the state of a personal judgment against the owner of land for taxes does not discharge a statutory lien for such taxes. *People v. Stahl*, 276.

5. Under the Act of Congress of July 14th 1870, repealing the legacy tax, personal property bequeathed to remaindermen after a life estate to testator's widow, prior to the passage of the act, but not vesting in possession through the death of the life-tenant until after the passage of the act, is not liable to the tax. *Mason v. Sargent*, 624.

6. The interest of a citizen of Maryland residing in Baltimore, as part owner of a vessel employed in foreign commerce, registered at Baltimore which is her home port and the residence of her owners, is liable for annual taxes levied on it by that city for municipal purposes. *Guntner v. Mayor, &c., of Baltimore*, 78.

7. The necessities of government and custom and usage have established a procedure in regard to the levy and collection of taxes which, although differing from proceedings in courts of justice, is still "due process of law." *Kelly v. City of Pittsburgh*, 78.

8. What parts of a state shall, for local purposes, be governed by a county, a town or a city government, and the character of the land included in each, are matters within the legislative discretion. *Id.*

9. When the taxes levied by a city upon land are clearly for a proper public purpose, and are authorized by statute, the court cannot say that such statute deprives the owner of his property without "due process of law," because the land is farm land and does not reap the same benefits as land in the heart of a city. *Id.*

10. The partial exemption from taxation allowed by sect. 3408 Rev. Stat. to deposits in a savings bank having no capital stock, and operating without profit to itself, applies to all deposits to the extent of \$2000 each, and not merely to deposits of \$2000 or less. *German Savings Bank v. Archbold*, 687.

11. The court of claims has jurisdiction of a suit to recover from the government the amount of a claim for taxes illegally collected, which claim had been duly presented to the commissioner of internal revenue and allowed under sects. 3220 and 3228 Rev. Stat. *United States v. Real Estate Savings Bank*, 423.

12. A claim presented to the collector within the period limited by sect. 3228 for presentation, is in time although not forwarded by the collector to the commissioner until after such period. *Id.*

13. Decisions of officers and tribunals, specially charged in tax laws, with the duty of valuing property and equalizing the valuations, are final. *Wagoner v. Loomis*, 423.

14. Even in cases of fraudulent discrimination equity will not relieve a taxpayer whose property has not been taxed more than if a proper assessment had been made. *Id.*

15. Where it is reasonably certain that a demand for reduction will be refused, such demand is not a prerequisite to a bill for relief against the collection of the whole tax. *Hill v. Nat. Albany Exchange Bank*, 624.

16. The investments in foreign countries of part of the capital of a bank, if of the character usually made by banks in doing a banking business, are liable to taxation by the state in which the bank is incorporated. *Nevada Bank v. Sedgwick*, 144.

17. Whether, if such investments had been made in fixed property subject exclusively to another jurisdiction, a different rule would apply, not considered. *Id.*

TAX AND TAXATION.

18. A provision in the charter of a corporation that it shall pay a tax on its capital stock in lieu of all other taxes, exempts only the property necessary for its business. *Bank of Commerce v. State of Tennessee*, 351.

19. Portions of a bank's building leased by it to other parties, and lots bought by it at a sale under a deed of trust made to it to secure a debt, are not within such exemption. *Id.*

20. In the case of an ordinance authorizing a particular improvement, there is a presumption that councils had determined that those who were specially assessed would be specially benefited. *Mayor and Councils of Baltimore v. Johns Hopkins Hospital*, 351.

21. The court cannot review such determination at the instance of the property owners specially taxed. *Id.*

22. If, however, a local assessment should be so unequal as to become extortion and confiscation, it would be the duty of the court to interfere. *Id.*

TELEGRAPH. See CONSTITUTIONAL LAW, 15.

1. The message sent to a telegraph office to be transmitted is the original, and the message received at the place to which it is transmitted is but a copy. *Smith v. Easton*, 79.

2. The delivery of the original message at the office must ordinarily be shown with proof of its authenticity. Where, however, the original has been destroyed the copy may be admitted, but only upon proof that it is a correct transcript of a message actually authorized by the party sought to be affected by its contents. *Id.*

3. The rule which permits a letter to be admitted in evidence without other proof of the handwriting than the fact that in due course it had been received in reply to a letter which had been addressed to the same party does not apply to a telegram received in answer to another telegram. *Id.*

4. A telegraphic dispatch is a sufficient writing to take a case out of the Statute of Frauds. *Id.*

5. A telegraph company is bound to perform its contract with integrity, skill and diligence; and if, by reason of the want of any of these qualities a message be improperly transmitted, the company will be liable. *Western Union Telegraph Co. v. Blanchard*, 351.

6. If it is necessary for the company, in transmitting messages with integrity, skill and diligence to have them repeated, the duty of so doing devolves upon it, not upon the sender. *Id.*

7. The company cannot, by any regulation of its own, protect itself against damages resulting from every degree of negligence except gross negligence or fraud. Nor can it limit the damages to be recovered to a return of the amount of toll paid. *Id.*

8. A message, "Cover two hundred September and one hundred August," was shown to be the ordinary expressions used in the cotton trade, meaning that the person receiving the message should sell for the sender two hundred bales of cotton deliverable in August, and one hundred deliverable in September. *Held*, that it was not such an obscure message as would limit the usual liability of the company. *Id.*

9. Where an agent incurs a loss by the negligent transmission of a telegram, the principal upon reimbursing him may recover from the company. *Id.*

10. The illegality of the contract would not relieve the company for liability for its negligence. *Id.*

TENANT FOR LIFE. See LIFE TENANT.

TORT. See DEBTOR AND CREDITOR, 15. PRACTICE, 1.

It is an actionable offence for a married man to offer himself in marriage to an unmarried woman, and a declaration in such action counting tortwise for fraud is good. *Pollock v. Sullivan*, 79.

TRADEMARK.

1. A mere general description by words in common use of a kind of article, or its nature and qualities, cannot of itself become a trademark. *Larrabee v. Lewis*, 276.

TRADEMARK.

2. "Snowflake" as applied to bread or crackers is a mere description of whiteness, lightness and purity. *Larrabee v. Lewis*, 276.

3. An arbitrary word not descriptive of the character or quality of the article may become a trademark. *Id.*

4. In order to have a trademark protected by injunction it should appear that the defendant's use of it was with the intent to mislead the public. *Id.*

5. A trade name of a firm is property to which the firm have an exclusive right, and it may be assigned to a successor firm, who thereby obtain the same right. *Howard v. Park*, 644, and note.

6. A dealer in a commodity identical with that dealt in by such firm will be enjoined from the sale of such commodity in a wrapper countersigned with such trade name even though the dealer purchased the commodity from a manufacturer who was authorized to affix the trade name to goods designed for the firm to which it belonged. *Id.*

TRESPASS. See CRIMINAL LAW, 26, 32. HUSBAND AND WIFE, 25. MUNICIPAL CORPORATION, 11. PARTNERSHIP, 4. PLEADING, 1. WATERS AND WATERCOURSES, 1.

1. A tax sale at another hour from that to which the sale had previously been adjourned renders the officer a trespasser notwithstanding that the property sold well and that plaintiff's attorney was present and said nothing. *Buzzell v. Johnson*, 687.

2. A mere license may be by parol, and is a defence for actions committed before its revocation, but the commencement of an action for damages by the licensor is a revocation. *Lockhart v. Gier*, 423.

TRIAL. See CRIMINAL LAW, 2, 14. EVIDENCE. LIBEL, 3. NEW TRIAL. PATENT, 3. VERDICT.

1. In trespass for assault and battery, where issue was joined on an answer justifying the trespass, the right to begin and close is in the plaintiff, unless special reasons exist authorizing the court to change the order, but unless it affirmatively appears that such special reasons do not exist the appellate court will not reverse because the defendant was allowed to begin and close. *Dills v. Ingersoll*, 144.

2. The court may allow the introduction of evidence after the conclusion of the arguments of counsel. *Darland v. Rosencrans*, 551.

3. Whether a reversing act of the legislature is or is not a law is a question for the court and not for the jury. *Amoskeag Nat. Bank v. Ottawa*, 687.

4. A party may dismiss his case even after the court has indicated what the instructions to the jury will be. *Mullen v. Peck*, 757.

5. Even in a case where it would not be improper to leave the case to the jury the court may give a binding instruction if the evidence is not sufficient to warrant a contrary verdict. *Stewart v. Town of Lansing*, 424.

6. It is error to charge that if the witnesses are equally credible the greater number will be entitled to the greater weight. *Bierback v. Goodyear Rubber Co.*, 424.

TROVER. See BAILMENT, 3. INFANT, 1. PLEDGE, 6.

1. One purchasing chattels by means of a fraudulent representation that he is the agent of another person, acquires no title thereto, and an innocent vendee from him is liable in trover for the value of the chattels, less whatever portion of the consideration was paid to the owner by the fraudulent purchaser. *Hamel v. Letcher*, 144.

2. The vendor in a conditional sale cannot maintain an action of tort in the nature of trover against an officer who, before payment, attaches the chattels as the property of the vendee. *Newhall v. Kingsbury*, 551.

3. A vendor who has been induced to sell by fraudulent representations of the vendee, and who, before discovery of the fraud, has received part payment, may maintain trover against a mortgagee from the vendee, without previous demand or tender of the sums received. *Warner v. Vallily*, 552.

4. In such case the part payment received may be retained as indemnity, to be subsequently deducted from the amount of damages recoverable by the vendor. *Id.*

TROVER.

5. Where plaintiff has a qualified interest in the chattel, he is entitled only to a sum sufficient to indemnify him and not to the whole value of the chattel. *Warner v. Vallily*, 552.

6. One who has assigned a mortgage as collateral and failed to tender the debt and demand a re-assignment until after foreclosure by the assignee, cannot then maintain trover in case of a refusal to assign. *Rice v. Dillingham*, 424.

TRUST AND TRUSTEE. See **CHARITY**, **CORPORATION**, 25, 26. **COSTS**, 1, 2. **GIFT**, 2. **PARTNERSHIP**, 17.

1. Where a trustee refuses to account for profits, or has so mingled the property with his own that he cannot separate the profits, he will be charged with compound interest. *State v. Howarth*, 277.

2. A trustee may appeal where the decree affects his commissions or where he is interested in the fund, or where the question of the increase or decrease of the whole fund is involved, but not where the contest is between creditors as to their respective rights against each other. *Frey v. Shrewsbury Sav. Inst.*, 757.

3. Where, however, the trustee, in appealing, acted in good faith in pursuance of what he supposed to be his duty, the costs will be paid out of the fund. *Id.*

4. Trustees ordering work done under an order of court granting them authority to do so, are personally liable to the mechanics for the price of the work unless the latter have agreed to look only to the trust funds. *Gill v. Carmine*, 79.

5. Where trustees have power to sell at their discretion and re-invest, a purchaser is not bound to see to the application of the purchase-money. *Van Bokkelen v. Tinges*, 757.

8. Where a deed conveyed land to the wife of the grantor for her use for life, provided that it should be used by the grantor's children, together with his wife as a home, and at her death be divided among them, and with power in the wife "at any time in her discretion to sell and convey the said property by deed, provided the proceeds of such sale are invested in other real estate for the uses expressed," a *bona fide* purchaser from the wife would not be bound to see to the application of the proceeds. *Guill v. Northern*, 277.

ULTRA VIRES. See **CORPORATION**, 7-10.**UNDUE INFLUENCE.** See **LUNATIC**, 5. **WILL**, 11-15.**UNITED STATES.** See **PATENT**, 9.

1. A patent for land is conclusive as to all matters determined by the Land Department when its action is within the scope of its authority, but such patent may be collaterally impeached in any action by showing that the department had no jurisdiction. *St. Louis S. & R. Co. v. Kemp*, 352.

2. There is nothing in the Acts of Congress which limits the size of a mining claim for which a patent may issue. The limitations in sects. 2330, 2331, Rev. Stat. relate to locations and not to patents. *Id.*

3. The owner of contiguous locations may consolidate them into one and present but a single application for a patent, such patent may be granted by the Land Department. *Id.*

4. The courts have no appellate jurisdiction over the rulings of the Land Department, nor can they reverse such rulings in a collateral proceeding where there has been no fraud on or by the officers of the department. *Quimby v. Coulan*, 552.

UNITED STATES COURTS. See **ADMIRALTY**, I. **CONFLICT OF LAWS**, 2. **EQUITY**, 7. **ERRORS AND APPEALS**, 4-10, 16. **JUDGMENT**, 2. **MUNICIPAL BONDS**, 3. **REMOVAL OF CAUSES**. **TAXATION**, 11. **UNITED STATES**, 4.

1. In a cause removed to a federal court the competency of a witness is to be determined by sect. 858 Rev. Stat., notwithstanding the fact that while the case was pending in the state court the witness had been declared incompetent under the state law. *King v. Worthington*, 137.

UNITED STATES COURTS.

2. A statute of a state which has been held by its highest courts invalid because not passed as its constitution directs, cannot be held valid by the federal courts upon the same evidence. *Amoskeag Nat. Bank v. Ottawa*, 688.

3. The construction given by the Supreme Court of a state to a Statute of Limitations of the state, will be followed by the United States Supreme Court in a case decided the other way in the circuit court before the decision of the state court. *Moores v. Citizens' Nat. Bank*, 345.

4. A statutory proceeding under which, after a fruitless execution, a judgment debtor is summoned before a judge or referee and compelled to make discovery as to his ownership of property, is within the provision of sect. 916 U. S. Rev. Stat., that the party recovering a judgment in a common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same as are provided in like causes by the laws of the state in which such court is held. *Ex parte Boyd*, 688.

5. Will follow the decisions of the state courts even on questions of commercial law, if the party would otherwise be subjected to a double payment. *Sonstiby v. Keeley*, 235, and note.

6. Whether in a common-law action involving the validity of a sale, the court can apply the equitable principle that an innocent vendee, paying a portion of the consideration after discovery of the fraud, will be liable to that extent. *Quere*, *Id.*

USURY. See CONTRACT, 5. CORPORATION, 10. NATIONAL BANK, 2.

1. One who has paid usury is entitled to have it deducted as an equitable offset, without plea or answer. *Cross v. Mann*, 80.

2. Substituting new notes and a new mortgage for an old one does not change the debt, and usury paid on the old debt may be deducted on ascertaining the amount due on the last mortgage. *Id.*

3. When overdue notes are transferred, usury paid to the original owner may be deducted. *Id.*

4. A. at the request and for the benefit of B., borrowed money and reloaned it to B., under an agreement that A. should receive the same rate of interest that he paid, and two per cent. for his expenses and credit. B. paid A. according to contract, and A. paid the creditor. *Held*, that the money so paid was not usury. *Held, further*, that whatever was paid in excess of the legal rate during that portion of the time when A., by reasonable diligence could have borrowed at six per cent., was usury. *Ricker v. Clark*, 688.

VENDOR AND VENDEE. See DAMAGES, 1. FIXTURES, 2. INSURANCE, 23. LIS PENDENS, 2. MORTGAGE, 24. SALE. SPECIFIC PERFORMANCE. TROVER, 1-3. WARRANTY.

1. Where one sells land for cotton to be afterwards delivered, he has no lien on the land for performance. *Harris v. Haine*, 424.

2. The taking of the secured note of a third person endorsed by the vendee is a waiver of the vendor's lien. *Kendrick v. Eggleston*, 552.

3. Vendor's lien waived by taking collateral for the purchase-money. *Nett v. Collins*, 688. *Boyer v. Austin*, 688.

4. Debts for purchase-money barred by the Statute of Limitations cannot be enforced by a vendor's lien. *Nett v. Collins*, 688.

5. Where a vendor who has conveyed the land to the vendee but has a lien for unpaid instalments of the purchase-money, sues for one of such instalments, recovers judgment and sells the land under execution thereon, he cannot afterwards enforce his vendor's lien for the remaining instalments. *Dickason v. Ely*, 80.

6. A vendee who has made part payment, and who, to protect himself, buys the title of his vendor at sheriff's sale, is not thereby relieved from his contract of purchase, but may set off the amount so expended by him against the balance of the purchase-money. *English v. English*, 815.

7. Rights of vendee in case of damage to property by fire before completion of purchase. *Note to Rayner v. Preston*, 94.

8. One purchasing land for the benefit of another, and taking the deed in the latter's name, stands in the place of the vendor, and is entitled to a lien for purchase-money advanced for the vendee's benefit. *Curey v. Boyle*, 208.

VENDOR AND VENDEE.

9. Where parties purchase from a common vendor who has laid out in the rear an alley common to them all, but by their titles their lots run back only to such alley, they receive no right except that of use to the land taken up thereby. *Bourke v. Perry*, 207.

10. The assignee of a contract for the sale of real estate by accepting the assignment becomes personally liable for the purchase-money. *Wightman v. Spofford*, 424.

VERDICT. See **ERRORS AND APPEALS**, 17. **NEW TRIAL**, 1.

1. When arrived at by means other than conviction of judgment on the part of the jury, will be set aside. *Dreyfus v. Lincoln*, 552.

2. The mere fact that the jury has allowed plaintiff less than the evidence shows him entitled to, if his theory be adopted, does not establish the fact that the verdict was a compromise one. *Id.*

3. Circumstantial evidence can supply the place of direct proof only when it points plainly to a particular conclusion, and can be reasonably explained only upon such particular theory. *Id.*

VESSEL. See **ADMIRALTY**. **EQUITY**, 3. **FRAUDS, STATUTE OF**, 1. **NEGLIGENCE**, 2. **SHIPPING**. **TAXATION**, 6.**VOLUNTARY CONVEYANCE.** See **DEBTOR AND CREDITOR**, 6, 8. **GIFT**. **HUSBAND AND WIFE**, 27.**VOLUNTARY PAYMENT.** See **PAYMENT**.**WAGER.** See **CONTRACT**, 4. **INSURANCE**, 11. **TELEGRAPH**, 10.**WAGES.** See **SHIPPING**, 2.**WAIVER.** See **ARREST**, 3. **CONTRACT**, 10. **CRIMINAL LAW**, 2. **INSURANCE**, 6, 8.**WAREHOUSEMAN.** See **STREET**, 1, 2.**WARRANTY.** See **DAMAGES**, 3. **JUDICIAL SALE**, 2. **SALE**, 7, 8.

An outstanding equitable title is not a breach of warranty of title until it is successfully asserted. *Wilson v. Irish*, 815.

WATERS AND WATERCOURSES. See **CONSTITUTIONAL LAW**, 5. **NEG-LIGENCE**, 9, 10.

1. One who owns land on each side of a navigable stream above the tide has the exclusive right to the ice formed thereon and may maintain trespass against a stranger who removes such ice. *Washington Ice Co. v. Shortall*, 313, and note.

2. The measure of damages for cutting and removing such ice is the value of the ice as soon as it has been cut and prepared for removal. *Id.*

3. Riparian owners on a navigable stream cannot recover damages for a diversion of the water by the state, or by a corporation acting by authority of the state for the improvement of the navigation. *Black Riv. Imp. Co. v. La. C. Booning and Trans. Co.* 424.

4. A deed of a tide-mill privilege, mill dam, wharf privilege, and the right to flow the creek and adjoining lands to high-water mark, "and all the rights and highways connected with and belonging to said mill privilege," gives the grantee no right to ice cutting nor title to the ice formed by changing the dam so as to exclude the salt water. *Dyer v. Curtis*, 80.

5. The right of a riparian owner to the water of a stream is not modified by the fact that the flow of the stream has been increased by reservoirs. *Silver Spring B. and D. Co. v. Wanskuck Co.*, 815.

6. The right to take "exclusively all the sea manures and drift stuff which lands on the West Shore, also to have the right of tipping the same and carting away at their pleasure, by a road or way leading on the bank of said West Shore clear of the gullies," does not embrace goods floated ashore from a wrecked vessel, and is confined to such stuff as could be collected and legally appropriated, not such as must be held for or delivered to a known owner. *Watson v. Knowles*, 816.

WATERS AND WATERCOURSES.

7. A dam built without legislative authority across an arm of the sea, to exclude the salt water for the purpose of creating an ice pond, is a public nuisance. *Dyer v. Curtis*, 80.

8. Without such authority such dam never acquires the right to exist by prescription. *Id.*

9. A lease by which the lessor agrees to keep up such dam is void, as against public policy, and either party may set up its illegality. *Id.*

WAY. See EASEMENT, 2-4.

WHARF. See NEGLIGENCE, 11.

WILL. See CORPSE. LEGACY.

1. Where a legacy to a class takes effect in point of right at one time, and in point of enjoyment at another, all will take who are embraced in the class at the time of enjoyment. *Jones's Appeal*, 272.

2. A devise of "all" of testator's property is a devise of the fee. *Piatt v. Sinton*, 269.

3. Where there is a devise in fee with a provision that if the devisee should die without leaving legitimate heirs of her body the estate should go to persons named, the fee taken by the first devisee is determinable only on the contingency of her dying without leaving such heirs living at the time of her death. *Id.*

4. A bequest to the executors in trust for the separate use of testator's daughter for life, "and from and after her death in trust for such child or children as she may leave, his, her or their assigns forever, but if my said daughter shall die leaving no children or child, then to my right heirs living at the time of their death," creates an executory devise which vests on the death of the life usee only in such of her children as survive her. *White v. Rowland*, 352.

5. Grandchildren cannot take under a bequest to children unless there be something in the will to indicate such intention. *Id.*

6. A testator directed his executors to invest a fund and to pay to his widow, for life or widowhood, one-third of the interest thereof, and to his children and grandchildren, whom he named, the remaining interest in designated portions; that if any such child or grandchild should die without issue, the survivors should take such decedent's share in like portions; that if any of them should die leaving lawful issue over twenty-one years of age, the executor should pay to the representatives of such decedent the principal on which such decedent had received the interest. One child died during the lifetime of the widow, leaving a daughter over twenty-one. *Held*, that the executors could pay her the principal of her share on her producing the widow's release of her interest therein. *Valentine v. Smith*, 140.

7. If a description of a legatee applies to different persons, the executor may maintain a bill of interpleader. *Moss v. Stearns*, 547.

8. In such case the costs, as between solicitor and client, of all parties to the bill are payable out of the general estate. *Id.*

9. Extrinsic evidence is admissible to show testator's relation to and feeling towards the respective claimants. *Id.*

10. A woman who had two nephews, one named Joseph White Sprague, and the other Joseph Sprague Stearns, by her will bequeathed a legacy "to my nephew, J. S. Sprague." *Held*, that the inference was that she intended Joseph White Sprague. *Id.*

11. Fraud or undue influence in procuring one legacy in a will does not invalidate other legacies, and a jury may find the will void as to the one legacy and valid as to the other. *Harrison's Appeal*, 208.

12. That the draughtsman was made the executor and his relations received a considerable portion of the estate devised, does not raise a presumption of undue influence. *Carter v. Dixon*, 816.

13. If the testator is competent in mind, and makes the will freely and voluntarily, the fact that he has preferences, dislikes and unfounded prejudices, will not avoid it. *Id.*

14. Where the only relevancy of a difficulty is to show the state of feeling

WILL.

between parties, the fact of the difficulty may be admissible, but its particulars are not. *Carter v. Dixon*, 816.

15. Undue influence must be established by other evidence than testator's declarations, although they are admissible to show the extent and effect of such influence. *Rusling v. Rusling*, 816.

16. Upon a failure to establish a will after caveat, the court can only enter judgment for costs against the propounder, and not against the legatees who have aided him. *Frances v. Holbrook*, 277.

17. Whether one who propounds a will at the instance or for the benefit of another can recover from the latter the costs, *quære*, *Id.*

18. Costs of detective employed by the principal legatee, if his services were valuable in establishing the will, may be paid out of the estate. *In re Lewis*, 816.

19. Where a will is destroyed with the connivance of part of the heirs, and no copy is in existence, a devisee not a party to such destruction is only required to show, in general terms, the disposition of property made by the instrument, and that it purported to be testator's will, and was duly attested. *Anderson v. Irwin*, 277.

20. On a bill to establish a will destroyed after the testator's death, proof of the sanity of the testator is not indispensable in the absence of counter proof, and the disposition made by him of his property may of itself afford sufficient evidence of his sanity. *Id.*

21. *Semble*, if a will be *bona fide* presented for probate, the costs, in cases of rejection, should fall upon the estate. *Id.*

22. The title of a *bona fide* purchaser from an executor under a sale by order of the probate court, will not be affected by the discovery of a later will. *Davis v. Gaines*, 208.

23. When the purchase-money, paid by a purchaser in good faith, of real estate of a decedent ordered to be sold by a probate court, has been applied to the extinguishment of a valid mortgage, and it turns out that the sale is irregular or void, the purchaser cannot be ousted of his possession without a repayment of the purchase-money so applied. *Id.*

WITNESS. See **ARREST**, 1. **CRIMINAL LAW**, 12. **EVIDENCE**, 14, 15, 20. **TRIAL**, 6. **UNITED STATES COURTS**, 1.

The fact that the witness is incompetent because he does not believe in a Supreme Being cannot be proved by examining the witness, but must be shown by his previous declarations. *Searey v. Miller*, 811.

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JANUARY, 1882.

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